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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No 632.

THE UNITED STATES OF AMERICA ON THE RELATION OF THE RIVERSIDE OIL COMPANY, PLAINTIFF IN ERROR,

vs.

ETHAN A. HITCHCOCK, SECRETARY OF THE INTERIOR.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MARCH 11, 1903.

(18,860.)

3701

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In the Court of Appeals of the District of Columbia

THE UNITED STATES OF AMERICA on the Relation of The Riverside Oil Company, a Corporation, Appellant,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.
} No. 1264.

a Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA on the Relation of The Riverside Oil Company, a Corporation, Petitioner,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.
} No. 45343. At Law.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Designation of Record on Appeal.*

Filed November 5, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA on the Relation of The Riverside Oil Company, a Corporation, Petitioner,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Defendant.
} At Law. No. 45343.

Comes now the appellant and designates the following parts of the record to constitute the record on appeal to the Court of Appeals, viz.:

The petitioner's petition.

Exhibits E, F, G, H, I, J, K, L, M, N (omitting argument). O (omitting argument), S (omitting argument), U, V (omitting argument), W and X.

Omit Exhibits A, B, C, D, P, Q and R; also omit Exhibit T, decision of defendant, now reported in 30 Land Decisions, 550, and Exhibit Y, decision of defendant on review, now reported in 31 Land Decisions, 288.

Include the following:

Rule to show cause and return.

Defendant's answer.

Stipulation of counsel.

Petitioner's demurrer.

Order overruling demurrer.

2 Motion for rehearing of demurrer, and exhibits.

Order overruling motion for rehearing, etc.

Order dismissing petition, noting appeal, fixing bond, etc.

SHIRLEY C. WARD,
JEFFERSON CHANDLER,
JOHN M. THURSTON,
W. C. PRENTISS,
Attorneys for Petitioner.

Copy of above received this 5th day of November, 1902.
H. H. GLASSIE.

3 *Stipulation as to Record on Appeal.*

Filed November 5, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA on the Relation of The Riverside Oil Company, a Corporation, Petitioner, *vs.* ETHAN A. HITCHCOCK, Secretary of the Interior, Defendant.	At Law.	No. 45343.

It is hereby stipulated between counsel for the appellant and the appellee that in addition to the matters designated by the appellant to constitute the record upon appeal, the following shall also be included, that is to say:

1. In place of Exhibit "A," the clerk shall note that the same is a copy of a deed dated October 28th, 1898, from C. W. Clarke and wife to the United States, reciting it to be the desire of the grantor to relinquish to the United States the thereinafter-described land within the limits of the Cascade Range forest reservation in the State of Oregon, and select in lieu thereof an equal quantity of vacant land open to settlement as provided by the act of Congress of June 4, 1897, and purporting to grant and relinquish to the United States the north half of section sixteen, township thirty-four south, range six east and the southwest quarter of section sixteen

township thirty-five south, range six east and the south half of section thirty-six, township thirty-seven south, range 5 east of
4 Willamette meridian, county of Klamath, State of Oregon, and agreeing to accept in lieu thereof other land to be thereafter selected by the grantor or his assigns, equal in area to that therein relinquished.

2. In place of Exhibit "B," the clerk shall note that the same is a deed dated May 5, 1899, from C. W. Clarke to the United States reciting it to be the desire of the grantor to relinquish to the United States the thereinafter-described land within the limits of the Cascade Range forest reservation in the State of Oregon, and select in lieu thereof an equal quantity of vacant land open to settlement as provided by the act of Congress of June 4, 1897, and purporting to grant and relinquish to the United States the east half of section sixteen, and the west half of section thirty-six in township twelve south, range nine east and certain other lands including the west half of section sixteen and all of section thirty-six township twenty-one south, range seven east of Willamette meridian, containing 12,789.07 acres, situate in the county of Crook, State of Oregon, and agreeing to accept in lieu thereof other land to be thereafter selected by the grantor or his assigns equal in area to that therein relinquished, the said deed being executed and acknowledged by the said Clarke and wife.

3. In place of Exhibit "C," the clerk shall note that the same is an abstract of title to the north half of section sixteen, township thirty-four south of range six; the southwest quarter of section sixteen in township thirty-five south of range six and the south half of section thirty-six in township thirty-seven south of range five, all east of Willamette meridian and containing in the aggregate
5 800 acres in the county of Klamath, State of Oregon, showing a deed dated October 22, 1898, conveying said lands from the State of Oregon to C. W. Clarke and a deed dated October 28, 1898, granting and relinquishing the same by said Clark and wife, to the United States, to which abstract is appended the certificate of C. H. Withrow, county recorder, in and for the county of Klamath, State of Oregon, certifying that the same is a true and correct abstract of all matters and instruments on file in his office.

4. In place of Exhibit "D," the clerk shall note that the same is an abstract of title to the east half of section sixteen and the west half of section thirty-six in township twelve south, range nine east, and other lands, including the west half of section sixteen and all of section thirty-six in township twenty-one south, range seven east of Willamette meridian, in Crook county, Oregon, and showing a conveyance from the State of Oregon to Andrew Anderson of a portion of the land described in said abstract; a conveyance of the same lan ls by Andrew Anderson to A. S. Baldwin; a conveyance dated May 1, 1899, from the State of Oregon to Flora M. Sherman of certain lands in the county of Crook, State of Oregon, including the west half of section sixteen, township twenty-one south, range seven east, of Willamette meridian; a conveyance from the State

of Oregon to A. S. Baldwin of certain land in Crook county, Oregon; a conveyance from the State of Oregon to H. S. Morris of certain land in Crook county, Oregon; a conveyance from A. S. Baldwin and Emma C., his wife, to C. W. Clarke, of certain lands in Crook county, Oregon; a conveyance from H. S. Morris and Mary P., his wife, to C. W. Clarke, of certain land in Crook county, Oregon; a conveyance dated May 4, 1899, from Flora M. Sherman to C. W. Clarke, of certain tracts of land in Crook county, Oregon,
6 including the west half of section sixteen, and section thirty-six in township twenty-one south, range seven east of Willamette meridian; a conveyance dated May 5, 1899, from C. W. Clarke and Philomen, his wife, to the United States, of certain lands within the limits of the Cascade Range forest reservation in the State of Oregon, to wit, the east half of section sixteen, and the west half of section thirty-six in township twelve south, range nine; and other tracts, including the west half of section sixteen and all of section thirty-six in township twenty-one south, range seven, all east of Willamette meridian and containing in the aggregate 12,789.07 acres, situated in the county of Crook, State of Oregon, to which said abstract is appended the certificate of Arthur Hodges, county clerk in and for the county of Crook, State of Oregon, certifying that the foregoing is a true, full and correct copy of all deeds and other instruments in writing on file in his office.

5. The clerk shall include in the record Exhibit "R," the decision of the Commissioner of the General Land Office.

6. The clerk shall include in the record Exhibits "T" and "Y," decisions of the Secretary of the Interior, but it is further stipulated that in lieu of copying said exhibits, the clerk may certify the copies of the same as they appear in the printed pamphlet sheets of the decisions of the Land Department, and that in the Court of Appeals copies of the said printed pamphlet may be incorporated into the printed record for the purpose of dispensing with the additional reprinting thereof.

SHIRLEY C. WARD,
JEFFERSON CHANDLER,
JOHN M. THURSTON,
W. C. PRENTISS,
Counsel for Appellant.

ASHLEY A. GOULD,
HENRY M. GLASSIE,
Counsel for Appellee.

7 *Petition.*

Filed April 16, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA on the Relation of The Riverside Oil Company, a Corporation, Petitioner,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Defendant.
} At Law. No.—.

The petition of the Riverside Oil Company respectfully represents:

1. That the petitioner is a corporation duly organized and existing under the laws of the State of Nevada, and empowered to acquire and hold land in the State of California.

2. That Ethan A. Hitchcock, the defendant, is the Secretary of the Department of the Interior of the United States of America, duly qualified and acting as such, and has been such Secretary, and acting as such ever since the 20th day of February, 1899.

3. That heretofore, to wit, on the 28th day of October, 1898, one C. W. Clarke, who was at all times hereinafter mentioned a citizen of the United States, was, through mesne conveyances, the owner in fee of the southwest one-quarter of the southwest one-quarter (S. W. ¼ of S. W. ¼) of section 36, township 37 south, of range 5 east, Willamette meridian, in the State of Oregon, containing 40 acres, covered by patent; and to wit, on the 5th day of May, 1899, the said Clarke, through mesne conveyances, was also the owner of the east one-half of the southwest one-quarter (E. ½ of S. W. ¼) and the southwest one-quarter of the southwest one-quarter (S. W. ¼ of S. W. ¼) of section 16, township 21 south, of range 7 east, Willamette meridian, in said State of Oregon, containing 120 acres, also covered by patent.

4. That, to wit, on the 14th day of February, 1893, the aforesaid townships and ranges in which said lands are situate, were, among other lands, by proclamation of the President of the United States, under and by virtue of the act of Congress approved March 3, 1891, (26 Stat., 1095, 1103) lawfully established as and still are a public forest reservation, and designated as the "Cascade Range forest reservation."

5. That by the act of Congress approved June 4, 1897, (30 Stat., 36) it was provided,

"That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding

in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

6. That the meaning of the words "vacant land open for settlement" as used in the last-mentioned act, and as established by long congressional, judicial, and departmental usage and interpretation, is public land appearing on the records of the Land Department as land not taken by an individual, or as decided by defendant in the case of F. A. Hyde (28 Land Decisions, 284, 287), "*any public land to which rights may be initiated by settlement under existing laws*," and the act in itself prescribes no other condition precedent to selection.

7. That by the amendatory act of June 6, 1900 (31 Stat., 588, 614), it was provided,

"That all selections of land made in lieu of a tract covered by an unperfected *bona fide* claim, or by a patent, included within a public forest reservation, as provided in the act of June fourth, eighteen hundred and ninety-seven, * * * shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry not exceeding in area the tract covered by such claim
8 or patent: *Provided*, That nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof,"

and the petitioner avers that by said last-mentioned act, Congress by limiting the class of lands open to lieu selection to "vacant surveyed non-mineral public lands which are subject to homestead entry," has specifically confirmed the aforesaid construction of the language of the original act of June 4, 1897, and recognized that the words "vacant land open to settlement" mean *even more than* "vacant surveyed non-mineral public lands which are subject to homestead entry," and your petitioner avers that under the law, the practice of the Land Department, and judicial determination, lands returned either as agricultural or mineral in character are enterable under the homestead law until the actual discovery of valuable mineral deposits thereon. (Rule 102, 28 Land Decisions, 610; and sec. 2341 R. S.)

8. That the said act of June 4, 1897, gave the Secretary of the Interior no authority to make regulations in any manner or form respecting the *exchange* of patented lands within the limits of a public forest reserve, for vacant land open to settlement, and the said Secretary of the Interior was wholly without authority to make any such regulations, or impose any conditions upon a selector, and his authority was and is limited to the exercise of his function of determining the sufficiency of the deeds of relinquishment to the Gov-

ernment, and directing the issuance of patents for the tracts selected; yet, nevertheless, on May 9, 1899, (28 Land Decisions, 521, 523), he wrongfully assumed the authority to approve and promulgate certain instructions addressed to the various local land officers, prescribing as requirements and conditions precedent to the relinquishment of forest reserve land, the following:

"In all cases relinquishments made in pursuance of said act must be executed, acknowledged and recorded in the same manner as conveyances of real property are required to be executed, acknowledged and recorded by the laws of the State or Territory in which the land is situated. Where the legal title to the land has passed out of the United States, there must also be filed with the relinquishment a duly certified abstract of title showing that at the time the relinquishment was filed for record the legal title was in the party making the relinquishment and that the land was free from liability for taxes and from other incumbrance,"

and approving a certain form for selection in lieu of the land relinquished, which form contained the recital of the cotemporaneous submission, among other things, of an affidavit "showing the lands selected to be non-mineral in character and unoccupied;" a true copy of which form is as follows:

4–643. Perfected claims.

Selection in Lieu of Land in —— Forest Reserve.

(Act June 4, 1897.)

To the register and receiver, United States land office ——.

GENTLEMEN: I am the owner of the —— meridian, containing — acres; that said land is situate and lying within the boundaries of the —— forest reserve; that I desire to relinquish and reconvey said land unto the United States, and in lieu thereof to select the —— land district, State of ——, and containing — acres, under the provisions of the act of June, 1897 (30 Stat., 36).

In compliance with the regulations under said act I have made, executed, and caused to be recorded in the proper county and State, a deed of reconveyance to the United States of the tract first above described and situate within said —— forest reserve, and in relation thereto have caused a proper abstract of title to be made and authenticated, both of which are herewith submitted.

There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from encumbrance of any kind; also that all taxes thereon, to the present time, have been paid; and an affidavit showing the lands selected to be non-mineral in character and unoccupied. I therefore ask that United States patent issue to me for the tract or tracts thus selected.

—— ——

Dated, —— —.

9. That the said C. W. Clarke, being the owner of said land covered by patents as aforesaid, within the aforesaid forest reserve, and desiring to accept the offer of exchange made by the United States in and by said act of June 4, 1897, did on the 28th day of October, 1898, execute, in conjunction with his wife, a certain good and sufficient deed in fee, conveying and relinquishing to the United States the said S. W. ¼ of S. W. ¼ of said section 36, township 37 S., R. 5 E., aforesaid, containing 40 acres, and on the 5th day of May, 1899, executed, in conjunction with his wife, a certain other good and sufficient deed in fee conveying and relinquishing to the United
9 States the said E. ½ of S. W. ¼, and S. W. ¼ of S. W. ¼ of section 16, T. 21 S., R. 7 E., aforesaid, containing 120 acres, and caused said deeds to be duly recorded in the respective counties in which the said lands are situate.

That by section 2 of the act of March 3, 1883, (22 Stat., 484), the registers and receivers of local land offices are required, upon application, to furnish official information as to what lands are *vacant*, and what lands are *taken*, and the petitioner avers that on the 14th day of December, 1899, the said C. W. Clarke applied to the register and receiver of the Visalia, California, land office for information as to vacant lands open to settlement in Visalia, California, land district, and was then and there officially informed by said local land officers at Visalia, that the following-described tracts of land, situate in the said Visalia land district, were vacant lands open to settlement, as shown by the tract books and records of said land office, viz, the north one-half of the southeast one-quarter (N. ½ of the S. E. ¼) of section 4, township 29 south, of range 28 east, Mt. Diablo base and meridian, and the south one-half of the northeast one-quarter (S. ½ of the N. E. ¼) of said section 4, said township and range, and thereupon, on the said 14th day of December, 1899, the said Clark delivered and surrendered to the said register and receiver of the said United States land office at Visalia, California, the said two deeds of conveyance and relinquishment, with abstracts of title showing good title to said lands in him the said Clarke, free from incumbrance, and then and there in lieu of said patented forest reserve land, designated and selected the said N. ½ of the S. E. ¼, and S. ½ of N. E. ¼ of said section 4, equal in area to said relinquished lands, and as evidence of such selection, filed with the said register written declarations of such selection, one for the N. ½ of the S. E. ¼, and one for the S. ½ of the N. E. ¼, of said section 4, and, though under no obligation so to do, at the request of the said local land officers filed with each of said declarations of selection an affidavit alleging in effect that said lands were vacant lands open to settlement, true copies of which said deeds of relinquishment, abstracts, declarations of selections, and affidavits, are filed herewith, marked respectively Exhibits A, B, C, D, E, F, G, and H.

And the petitioner avers that when the said deeds of relinquishment were executed, recorded, delivered, and surrendered to the said register and receiver as aforesaid, the said lands so relinquished were free of encumbrance, and by the delivery and surrender of

said deeds as aforesaid, the said Clarke became devested of the title to said lands, and the title in fee thereto *became vested absolutely in the United States*, and the United States can devest itself of the title thus acquired *only* by act of Congress.

And the petitioner avers that the said two tracts of land selected by said Clarke as aforesaid were duly surveyed, among other lands, by the United States surveyor general for the State of California, and duly returned and classified by him as agricultural lands prior to said selections, and at the time of selection by said C. W. Clarke as aforesaid, the said two tracts of land were shown on the books and records of the Land Department as and being agricultural land, not reserved or otherwise closed to settlement, but subject to disposition under the land laws of the United States, and especially under the said act of June 4, 1897, and, at the time of selection by said Clarke as aforesaid, there was upon the records of the Land Department no filing, entry, or claim to said selected lands, and the same were vacant lands open to settlement. And the petitioner, still insisting that the land office records are binding upon the United States, and the Land Department thereof, as to the character of the land, yet further avers that at the time of said selection by said Clarke, there had been no discovery of mineral on said lands, and no mineral was known to exist therein, and the same were in law and in fact agricultural lands, and no valid or legal claim to the same had then or theretofore been initiated, and at the time of said selections the complete title to said lands was in the United States, and the United States were the sole and exclusive possessors and occupiers of the same as part of the vacant public land open to settlement.

10. That by the said relinquishment of said patented forest reserve lands, and the selection of said tracts in lieu thereof as evidenced by the declarations aforesaid, the said Clarke effected and perfected *a valid and binding exchange* of his said patented lands for the lands so selected, exchanging title for title, possession for possession, occupancy for occupancy, and became the owner of said selected lands with general warranty of title from the United States, and entitled to patents therefor without cost. And the petitioner avers that the defendant in his decision rendered July 5, 1900, in the case of *Ex parte* McDonald (30 Land Decisions, 124), held such to be the effect of the said act of June 4, 1897,—

"By his deed of relinquishment and conveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer of the Government contained in the act of June 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the Government into *a contract fully executed upon his part, and in the execution of which by the Government he had a vested right.* After McDonald had fully complied with the terms on which the Government by said act had *declared its willingness to be bound, no act* of either the execu-

tive or legislative branch of the Government could divest him of the right thereby acquired,"

and also in his decision rendered July 13, 1900, in the case of Clarke *vs.* Northern Pacific R. R. Co. (30 *id.*, 145, 148), saying,—

"If the lands selected by Clarke were subject to selection at the time he made selection thereof, and if, as appears to have been the case, the lands embraced in his deed of relinquishment and reconveyance were proper bases for his selections, he acquired, *at the time of filing such selections and deeds of relinquishment and reconveyance, vested rights in the execution by the Government of its part of the contract for the exchange of lands.*"

And the petitioner avers that by the act of January 27, 1898, (30 Stat., 234), it was provided that the register and receiver for each land district

"shall have charge of and attend to the sale of public and Indian lands within their respective districts,"

and that upon the delivery and surrender of the said deeds of relinquishment, and the filing of the said declarations of selections as aforesaid, the said register and receiver of the Visalia, California, land office made a further examination of the records of their said office, and, by virtue of the *original* jurisdiction conferred upon them by said act of January 27, 1898, then and there *accepted on behalf of the United States the said deeds of relinquishment, and the said declarations of selections*, and appended to each of said declarations a certificate duly signed by said register, as follows:

LAND OFFICE AT VISALIA, CALIF., *December* 14, 1899.

I, Geo. W. Stewart register of the land office, do hereby certify that the land above selected, in lieu of land relinquished to the United States, is free from conflict, and that there is no adverse filing entry, or claim thereto.

GEO. W. STEWART, *Register.*

and entered the said selected lands upon the records and tract books of their office as *taken* by the said Clarke.

11. That notwithstanding the title of the said Clarke to the said selected lands and his right to patents therefor had become vested by the relinquishment and selection aforesaid, and the said act of June 4, 1897, had guaranteed the selector a patent without cost, yet the Land Department, without authority of law, thereafter required the said Clarke to publish a notice of his said selections for a period of sixty days, and pay for the same, and the register of said Visalia, California, land office under dates respectively of January 21 and 22, 1900, forwarded all the papers aforesaid to the Commissioner of the General Land Office accompanied by letters certifying a second time that the records of his office "*show the lands selected to be free from conflict and subject to such selection*" and reporting that publication had been ordered under circular of the General Land Office of

December 18, 1899, (subsequent in date to the selections by said Clarke aforesaid), true copies of which said letters are filed herewith, marked respectively Exhibits I and J.

12. That although there was no legal obligation so to do, yet the said Clarke complying with the said requirement of publication of notice, caused to be duly published a notice in the manner and form prescribed, whereupon, on February 6, 1900, the Kern Oil Company filed in the said local land office a protest against both of said selections, with accompanying affidavits, a true copy of which is filed herewith, marked Exhibit K.

And on February 12, 1900, J. F. Elwood and others filed in said local land office separate protests against said selections, with accompanying affidavits, true copies of which are filed herewith, marked respectively Exhibits L and M.

That all of said protests were thereupon forwarded to the General Land Office.

And the petitioner avers that the said protests were and are insufficient in form and substance to constitute an issue as to whether or not said lands selected as aforesaid by said Clarke were vacant lands open to settlement at the time of such selections, and that the said protestants, by reason of such non-discovery of minerals in the said lands, were wholly without standing as adverse claimants under the law and practice of the Land Department.

11 And the petitioner further avers that the said protests are also insufficient in form and substance to serve as a foundation for declaring an issue between the United States and the said selector as to the character of the land at the time of selection as aforesaid.

And the said protests being insufficient to raise an issue between either the said protestants, as contestants, or the United States and the said selector, the petitioner thereupon caused to be filed in the General Land Office motions to dismiss the said protests, true copies of which motions are filed herewith, marked respectively Exhibits N and O.

13. That on the 2nd day of January, 1900, the said C. W. Clarke by a certain deed in fee, duly recorded, conveyed the said N. ½ of S. E. ¼, and the said S. ½ of N. E. ¼ of said section 4, to one D. E. Alexander, and thereafter, to wit, on the 7th day of July, 1900, the said Alexander, by a certain deed in fee, duly recorded, conveyed the said lands to the petitioner, true copies of which said deeds are filed herewith, marked Exhibits P and Q, by which deeds of conveyance the petitioner succeeded to, and became vested with, all of the right, title and interest of the said C. W. Clarke in and to the said lands, and is still the owner thereof, and entitled to demand and receive from the United States patents therefor in the name of said C. W. Clarke, and, under the practice of the Land Department, to prosecute and defend in the name of said Clarke, all proceedings in said department involving the said selections, and the petitioner has, through its attorneys, so prosecuted and defended all subsequent proceedings in the Land Department affecting said selections, and

demanded patents therefor, always insisting, however, that the right to patents for said selected lands was vested as aforesaid in said selector Clarke, and could not be defeated by any action of the Land Department.

14. That, at the time of the said selections by the said Clarke, no person or persons had any right, title, or interest, either vested or inchoate, in or to said lands so selected by said Clarke, but each and every of the persons in said protests and affidavits therewith alleged to have been upon the said lands as locators at or before the time of the said selections, and under whom the said protestants asserted pretended rights, were mere pretended explorers for minerals and had made no discovery or discoveries of minerals upon the said lands or any part thereof, but had merely staked off pretended mining claims, for the purpose of deceiving others and discouraging and deterring them from acquiring said lands under the land laws.

That such staking off of pretended mining claims initiated no lawful right, inchoate or vested, for the mineral land law, (sec. 2319 R. S.) does not grant any right of occupation until discovery, and (sec. 2320 R. S.) *prohibits* location before discovery, or, as construed by the Supreme Court of the United States, "*discovery* and appropriation [location] are the source of title to mining claims." (O'Reilly *vs.* Campbell, 116 U. S., 418, and cases cited.)

That the said alleged locators made no discovery or discoveries of minerals upon the said lands, and acquired no possessory or other rights therein or thereto, and, by the alleged attempted conveyances from said alleged locators to the said protestants, the latter acquired no rights whatever in or to the said lands.

That the said protestants never themselves staked or restaked any claim or claims upon the said lands, and do not in the said protests set up any claim of right or title except through and by the said attempted and ineffectual locations and conveyances from the said alleged original locators.

And the petitioner avers that the right to contest in the Land Department the character of the land selected by others is conferred by section 2335 R. S., as follows:

"In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to *the opposing party;* or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given."

And such section contemplates and authorizes hearings only when the adverse party shows a color of title, or right to the land.

15. That on December 18, 1900, the Commissioner of the General Land Office consolidated said two selections, considered them as one case, and rendered a decision in the matter, holding that the title of the selector did not vest until approval by the Commissioner and that "the land in these selections is yet open to exploration under the mining laws, and if at this date the lands are shown to be min-

eral it defeats the selection," and concluding by directing the
12 said local land officers at Visalia, California, to notify the said Clarke that he would be allowed thirty days within which to apply for a hearing, all of which will more fully appear by reference to the said decision, a true copy of which is filed herewith marked Exhibit R.

From this decision and disposition of the case, the petitioner caused an appeal to the Secretary of the Interior to be taken and prosecuted in the name of said selector Clarke, assigning as error among other things, that the Commissioner erred, in not sustaining said motions to dismiss the said protests and passing said selections to patent; in ordering a hearing; in not holding that the showing of the tract books and land records at date of selection, governed the character of the land for the purpose of said selections; in holding that a discovery of mineral upon the lands selected *subsequent* to said selections and before approval by the Commissioner would defeat the same; in calling upon the said selector to demand a hearing and assume the burden of proof upon the question of the character of the land; and in directing that at such hearing, if demanded, the character of the land subsequent to said selections should be embraced in the issue; as will more fully appear by reference to a true copy of said appeal filed herewith, marked Exhibit S.

16. That the title to the said selected lands having vested in the said Clarke *ipso facto* by the relinquishment and selections aforesaid, the only question before the defendant for decision on the said appeal was as to the propriety of the action of the Commissioner of the General Land Office and his authority to take any action other than to pass the said selections to patent. Yet, nevertheless, on the 25th day of April, 1901, the respondent rendered a decision in said matter, a true copy of which is filed herewith marked Exhibit T, wherein he ignored his previous decisions and the real issue presented, and held that questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtain title have been complied with by the selector; that the mere recital in the form approved by the respondent (form 4—643, as set out in paragraph 8 hereof,) of an accompanying non-mineral and non-occupancy affidavit constituted a regulation of the department requiring the filing of such affidavit as a condition precedent to the vesting of the selector's title; that such alleged regulation was binding upon selectors of forest reserve lieu land; that the affidavits filed by said selector Clarke failed to allege non-occupancy, and therefore he had not complied with the requirements necessary to obtain title; that *since* the said selections by said Clarke valuable deposits of mineral petroleum oil had been discovered; and that in view of the alleged admitted occupancy *subsequent* to the said selections, and the subsequently discovered value of the land for mining purposes, it was apparent that the required proofs of the then non-mineral character and non-occupancy of the land could not then be supplied,

and that therefore the said selections must be rejected; and by such decision vacated the order of the said Commissioner directing a hearing, and arbitrarily, wrongfully and unlawfully attempted to reject the said selections and destroy the vested rights of the said Clarke and his grantees.

17. And the petitioner avers that a non-occupancy or other affidavit is not required by the said act of June 4, 1897; and neither the defendant nor the Land Department had any authority to demand it; that the form for selection containing the recital of the filing of a non-occupancy affidavit was first issued on or about May 4, 1898, a copy of which form is herewith filed, marked Exhibit U, and, contrary to the cutsom of the Land Department where affidavits are required, no form of such affidavit has ever been adopted or furnished by the said Land Department.

That previous to May 4, 1898, the Land Department had prescribed no form for selection under the said act of June 4, 1897, or required any affidavit, and after the issuance of the said instructions of May 4, 1898, the said Land Department treated the recital of the filing of a non-occupancy affidavit as merely directory, and not mandatory, and patented dozens of forest lieu selections under said act of June 4, 1897, in which no non-occupancy affidavit had been filed or required, and the petitioner avers that the usage and practice of the Land Department in that respect had acquired the force of law, and could be changed only by express regulation to the contrary, and such regulation could not be made retroactive (Miner *vs.* Marriott, 2 Land Decisions, 711; *Ex parte* Thompson, 8 *id.*, 109), even had the Secretary of the Interior power, which he did not have, to make regulations under said act of June 4, 1897; and that the defendant under the practice of the Land Department had no power or authority to apply a different rule *for the first time* to the said selections of said Clarke.

18. And the petitioner avers that the sufficiency of the affi-
13 davits accompanying the said declarations of selections by said Clarke, was not questioned by the local land officers, and the said alleged omission even had it been material, was waived by the local land officers in the exercise of their original jurisdiction under the act of January 27, 1898, aforesaid, by the acceptance of the said deeds of relinquishment and affidavits filed therewith, and *entry* of said selections upon the records and tract books of said local land office at Visalia, California.

That the protests aforesaid in nowise questioned the sufficiency in substance and form of the said selections made by said Clarke, nor was the point of the alleged insufficiency of said affidavits raised by the Commissioner of the General Land Office in his said decision of December 18, 1900, and the United States has in nowise notified the selector of any defect in the exchange, and there is no issue in the record charging a failure to comply with the law.

And the petitioner avers that under the settled rules of appellate procedure in force in the Land Department as well as in the courts, the said point of alleged insufficiency of the said affidavits could not

be raised for the first time by the defendant in his appellate capacity to enforce an alleged regulation which, in the matter before him and in all other cases under said act of June 4, 1897, had been waived and ignored by the local land officers and the Land Department. (United States *vs.* Morant, 123 U. S., 335, 343.)

19. And the petitioner avers that the said affidavits, though not essential to the validity of the contract of exchange tendered by Congress and accepted and completed by the relinquishments and selections aforesaid, did, in law and in fact, allege the non-occupancy of the land as understood in the law and the practice of the Land Department, as they expressly negative all the elements of *legal occupancy*.

20. And the petitioner avers that under the rules of the Land Department the said decision of the defendant was, on the 2nd day of May, 1901, promulgated by the Commissioner of the General Land Office, and thereafter, to wit, on the 25th day of May, 1901, within the time allowed by said rules, the petitioner caused to be duly filed in the Land Department a motion for review of the said decision of April 25, 1901, alleging, that defendant erred, among other things, in holding that the mere recital in the form aforesaid constituted a regulation creating a condition precedent to the vesting of the said selector's title; in holding that such alleged regulation was binding upon said selector; in holding that the affidavits filed by said selector were insufficient; in holding that the said selector's title had not vested at the time of selection; in holding that subsequently discovered value of the land for mining purposes prevented the consummation of the contract of exchange between the Government and the selector; and in attempting to reject the said selections; a true copy of which motion is filed herewith, marked Exhibit V. And thereupon, under the rules of practice of said Land Department, said motion operated as a supersedeas of said defendant's said decision and action.

21. And the petitioner, protesting that the requirement of a non-occupancy or other affidavit was not in anywise essential to the validity of the contract of exchange effected by the said Clarke's selections aforesaid, and that the defendant was estopped from raising the point and deciding the case on said alleged insufficiency of said affidavits, and insisting that the said affidavits did in fact aver non-occupancy of the said land as understood by the law and practice of the Land Department, avers that the requirement by the Land Department of an accompanying affidavit as aforesaid, could be only matter of administrative policy, for even the general grant of authority to make regulations (section 2478 R. S., which is not applicable to the special act of June 4, 1887,)

"Is not a grant of power to legislate; to add to the law; to render its enforcement difficult; to burden the proceedings under it with unnecessary expense or hardship; or to encumber them with onerous and technical conditions. It is designed that the permitted regulations shall simplify and explain, not embarrass, the administration of the law; and certainly they must not only be appropriate,

but they must be reasonable, and within the limitations and intent of the statute." (Anchor *vs.* Howe, 50 Fed. Rep., 366.)

and any insufficiency in such affidavit would be merely a defect of form or procedure, which, under the rulings and practice of the Land Department and courts, if not waived by a failure of the local land officers to require it, which the petitioner avers resulted as aforesaid, could be cured at any time before final action, and the petitioner, for the full protection of its rights in the premises and to remove the aforesaid technical, specious, unreasonable, unwarranted and unlawful objection raised by the defendant, procured and caused to be filed in the Land Department on the 5th day of June,
14 1901, two certain supplemental affidavits alleging specifically that the said selected lands were unoccupied at the date of the said selections by said Clarke, true copies of which said affidavits are filed herewith, marked respectively, Exhibits W and X; and the petitioner avers that said affidavits were and are true in fact, and said alleged defect, if any, upon which the defendant based his decision aforesaid was thereupon and thereby cured.

22. That thereafter the defendant granted a hearing on said motion for review and ordered oral argument thereof before the Assistant Attorney General of the United States for the Department of the Interior, on the 8th day of October, 1901, and on the said day the matter came on for argument and hearing before the said Assistant Attorney General, who arbitrarily refused to hear any argument upon the question of the authority of the Secretary of the Interior to prescribe a non-mineral and non-occupancy affidavit, and required the argument to proceed upon the assumption that the Secretary of the Interior had by proper and lawful regulation prescribed such affidavit as a condition of selection under said act of June 4, 1897.

23. That thereafter, to wit, on the 12th day of April, 1902, the defendant rendered a decision adhering to the erroneous, unwarranted, and arbitrary ruling aforesaid, ignoring the curative effect of the supplemental affidavits, denying the said motion for review, and returning the papers to the Commissioner of the General Land Office, a true copy of which said decision is filed herewith, marked Exhibit Y.

Your petitioner alleges that the honorable Secretary of the Interior illegally and arbitrarily held and decided in said decision on review and on the application of petitioner to review said primary decision that the words "vacant land" in said act of June 4, 1897, meant land on which no one was shown by affidavit to be present, whether claiming title thereto or not, at the time of selection; and erroneously held and decided that the land selected was not "vacant land," though in truth and in fact vacant and unoccupied, if such vacancy and lack of occupancy was not shown by an affidavit of selector made and filed at the time and as a part of said selection; and erroneously held and decided that to be vacant land in the meaning of the act of June 4, 1897, the selected land must be not only free from the presence of any one on the land as a matter of fact, but must be shown to be free from such presence of any one on

the land at the date of selection, by an affidavit of selector made and filed by selector as a part of the record of selection, and that, notwithstanding the selected land at the time of the selection was in fact unoccupied, nevertheless the selection was void, so the decision arbitrarily holds, unless the said selection was when made then and there shown to be on unoccupied land by an affidavit of selector as a part of the record of selection.

Your petitioner alleges that there was no person present on the selected land at the time of selection. Your petitioner also alleges that no claim adverse to selector existed to such land at the date of selection; that the decision on review rests solely on the erroneous assumption of the honorable Secretary of the Interior that the words "vacant land" in the act of June 4, 1897, means land free from the presence thereon actual or constructive of any one whether claiming said selected land or not and that though unoccupied still the selected land was not vacant land under said act of June 4, 1897, unless and until shown by affidavit of selector to be unoccupied.

Your petitioner alleges that the said decision on review turns solely on a question of law and not on any question of fact or on any question of mixed law and fact; that the only question of law involved is the meaning of the act of June 4, 1897, and the particular words therein "vacant land open to settlement;" that your petitioner has done and performed all the acts required of him to be done by said act and by said words of said act; that the selected land was in fact and in law, vacant land open to settlement when selected and was so held to be by the receiver and register of the land office having jurisdiction so to decide at the time and when selected; that the honorable Secretary of the Interior erroneously held in his decision on review that the statute of June 4, 1897, only permitted land to be selected thereunder which had upon it at the time of selection no person and that the word "vacant" in said statute had reference to the physical condition of the land when selected and not to any claim upon or right to the land itself; and the petitioner avers that no adverse interest to that of selector exists or appears in the record of exchange of the lands herein described; that the United States makes no claim to the selected land and protestant has no interest therein; that on the record in this case petitioner is entitled to a patent for the selected land without cost therefor.

Your petitioner further alleges that all of the objections to the said selections set forth in the said protests were on appeal considered, weighed and decided against and held for naught by the defendant, and the judgment and findings of the Commissioner of the General Land Office and the order for a hearing on said protests were by the defendant reversed, overruled and vacated and judgment thereon on appeal rendered against said protests and protestants and in favor of the selector, but the defendant arbitrarily refuses to pass the said selections to patent and has arbitrarily ordered the case of the said selections dismissed from his docket, solely because of the alleged absence from the record of selection of a non-occupancy affidavit and not because of any ground or cause of objection to the

selections set up in said protests; that no review of the finding and judgment of the defendant on appeal vacating said judgment of the said Commissioner could have been or has been asked for or had by the said protestants or any of them, or by any one, but all parties have acquiesced in the vacating on appeal of said Commissioner's decision and judgment; that no contest in the case of the said selections was ever begun and the said Commissioner's decision and action in the case having been in all respects vacated and held for naught on appeal, there remains in the record of said selections in the Land Department no issue or question as to the validity of said selections or the title of the said selector and his grantees to the said lands selected as aforesaid and their right to receive patent or patents for the said lands.

15 And your petitioner avers that by said decision denying the said motion for review and adhering to his previous action aforesaid, the said defendant rejects said selections and applications for patents on the sole ground that the said affidavits accepted by the said local land officers as aforesaid, did not contain the following language, to wit:

"That there is no occupation of said land adverse to the selection thereof under the act of June 4, 1897," and. "That no portion of said land is claimed for mining purposes under the local customs and rules of miners or otherwise."

And the petitioner avers that inasmuch as the said selector Clarke by the selections aforesaid, and payment therefor by conveyance and relinquishment of the said patented forest reserve lands as aforesaid, secured a vested interest in the said selected lands, and a right to a patent therefor to which vested interest it has succeeded as aforesaid, and

"can no more be deprived of it by order of the Commissioner [or Secretary of the Interior] than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest *will be corrected whenever the matter is presented so that the judiciary can act upon it.*" (Cornelius *vs.* Kessel, 128 U. S., 456, 461; Brown *vs.* Hitchcock, 173 U. S., 473, 478.)

And the petitioner avers that the said action of the defendant is an abuse of his power of supervision, for, such

"power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law," (Cornelius *vs.* Kessel, *supra;* Brown *vs.* Hitchcock, *supra*),

but nevertheless such action of the defendant in denying the said motion for review is final, and the petitioner has exhausted its remedy in the Land Department.

23*a*. And your petitioner further alleges that upon making the relinquishment aforesaid and the selections aforesaid in lieu thereof and the making of the certificates by the said register and receiver as aforesaid that the said selected lands were eligible to selection, it

became and was then and there the duty of the Commissioner of the General Land Office and the defendant to order a patent or patents for the said selected lands to be issued to the said selector Clarke and it is still their duty so to do.

And your petitioner further avers that in consequence of his arbitrary and unwarranted action in the premises as aforesaid, the defendant has never exercised any judgment or discretion in the premises and refuses to obey the law and discharge his duty and to order patent or patents to issue for the aforesaid lands to the said selector Clarke.

24. That after said selections by the said Clarke as aforesaid, to wit, on or about February 1, 1900, the said protestants by themselves or their privies, grantees, and employees, wrongfully and unlawfully, and without the knowledge or consent of the said Clarke or his grantees, for the first time entered into possession of the said selected lands, and have ever since held, and do now wrongfully hold, possession thereof, and exclude the said Clarke and his grantees, the said Alexander and the petitioner, therefrom by intimidation and threats of violence.

25. That neither the said protestants nor any person or persons other than the said selector Clarke have up to the present time filed in the Land Department any mineral or other claim to said selected lands, and no person or persons other than the petitioner are now seeking title thereto from the United States; that though the title of the petitioner to the said selected lands, as grantees through mesne conveyances from the said Clarke, is vested and indefeasible, and cannot be affected in law or equity by the said arbitrary and unlawful attempted rejection and cancellation of the said selections by the said defendant, yet the said action of the defendant attempting to reject the said selections, and denying patents thereunder, leaves remaining in the Gand Department no case or proceeding involving the title to the said selected lands, and the petitioner is left remediless in the Land Department; that by the said decision and action of the said defendant, the title to the said selected lands, so far as the Land Department is concerned, still remains in the United States, and your petitioner cannot further proceed against the United States to secure patents for said selected land either by action in the Land Department or in the courts.

And the petitioner is remediless in the premises by any known proceeding in any court of law or equity, or in the Land Department, to enforce its rights, except by this application for mandamus, and unless the writ of mandamus be issued by this honorable court, directed to the said defendant, your petitioner will be deprived of the possession and enjoyment of the said selected lands, and that the said selected lands are now worth more than ten thousand (10,000) dollars.

26. And the petitioner avers that the action of said defendant complained of is a matter of public concern and one occurring in the administration of justice.

Wherefore, the petitioner prays that this honorable court will, by

its writ of mandamus, command the said defendant, the said Ethan A. Hitchcock, Secretary of the Interior, as aforesaid, to forthwith recall and vacate his said order rejecting said selections of said Clarke, and if said selections have already been canceled, to vacate and recall said cancellation, and reinstate the proceedings relating to the said selections, and thereupon to proceed therein as re-
16 quired by law, and to order said selections passed to patent, and cause to be prepared and presented for signature to and by the proper officer of the United States of America, a patent or patents for the said selected lands, and that the petitioner may have such other or further relief as the premises warrant and to the court may seem meet.

RIVERSIDE OIL COMPANY,
By JOHN R. JOHNSTON, *President.*

JEFFERSON CHANDLER,
Att'y for Petitioner.
HORACE F. CLARK,
W. C. PRENTISS,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

I, John R. Johnston, do solemnly swear that I am the president of The Riverside Oil Company, the petitioner named in the foregoing petition, and as such president have signed the same in the name of said company, and have authority so to do; further that I have read the said petition and know the contents thereof and that the matters therein stated of my own knowledge are true and those stated on information and belief I believe to be true.

Subscribed and sworn to before me this 16th day of April, A. D. 1902.

ALBANUS S. T. JOHNSON,
[SEAL.] *Notary Public.*

17 EXHIBIT "E."

Filed April 16, 1902.

Act June 4, 1897 (30 Stat., 36).

Selection in Lieu of Land in the Cascade Range Forest Reserve, Lakeview Land District, State of Oregon; created Feb. 14th, 1893.

45343.

To the register and receiver, United States land office, Visalia, California.

GENTLEMEN: In accordance with the provisions of an act of Congress approved June 4, 1897, entitled "An act making appropria-

tions for sundry civil expenses of the Government for the fiscal year ending June 30, 1898, and for other purposes,"

I, C. W. Clarke of San Francisco city and county, State of California, do hereby select and locate the following-described tract of surveyed land, to wit:

The north half of the southeast quarter of section four (4) in township twenty-nine (29) south, range twenty-eight (28) east of Mount Diablo meridian, containing eighty (80) acres.

In lieu of

The east half of the southwest quarter of section sixteen (16) in township twenty-one (21) south, range seven (7) east of Willamette meridian, containing eighty (80) acres.

18 The said last-mentioned tract is included within the limits of the Cascade Range forest reservation in Oregon, and being the owner, and desiring to select other land in lieu of said tract, I made and executed a deed of reconveyance thereof to the United States, on the 5th day of May, 1899, as provided by the said act of June 4, 1897, which said deed has been recorded in the proper county. I therefore ask that a United States patent issue to me for the land hereby selected.

Witness my hand this 13th day of December, 1899.

C. W. CLARKE.

Post-office address c/o F. A. Hyde, 415 Montgomery St., San Francisco, Cal.

[On the margin:] Part in California posted M'ch 3, 1900 E. V. J.

LAND OFFICE AT VISALIA, CALIF., *December* 14, 1899.

I, Geo. W. Stewart, register of the land office, do hereby certify that the land above selected, in lieu of land relinquished to the United States, is free from conflict, and that there is no adverse filing, entry or claim thereto.

GEO. W. STEWART, *Register.*

Selection approved by the Commissioner of the General Land Office, per letter "P" to register and receiver —— — 189– —— Div. "P."

19 Application to select endorsed on back as follows:

This application is accompanied by the affidavit of A. Barion of San Francisco, Cal., as to the non-mineral character of the land herein selected.

An abstract of title (duly certified by the recorder of Crook county, Oregon), to the land designated as basis for the within application, together with original deed from C. W. Clarke and Philomen Clarke (his wife) to the United States of America, dated May 5th, 1899, recorded May 11th, 1899, in vol. 7 of deeds, records of Crook county, Oregon, — will be found on file with the application of C. W. Clarke to select, under the provisions of the act of June 4th, 1897, all of sections 10, 14, 22, 26, 28 and 34, T. 15 N., R. 6. W., Olympia land district, Washington.

20 EXHIBIT "F."

Filed April 16, 1902.

Act June 4, 1897 (30 Stat., 36).

Selection in Lieu of Land in the Cascade Range Forest Reserve, — Land District, State of Oregon; Created Feb. 28th, 1893.

45343.

To the register and receiver, United States land office, Visalia, California.

GENTLEMEN: In accordance with the provisions of an act of Congress approved June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June 30, 1898, and for other purposes."

I, C. W. Clarke of San Francisco city and county, State of California, do hereby select and locate the following-described tract of surveyed land, to wit:

The south half of the northeast quarter of section four (4) in township twenty-nine (29) south, range twenty-eight (28) east of Mount Diablo meridian, containing eighty (80) acres.

In lieu of

The southwest quarter of the southwest quarter of section sixteen (16) in township twenty-one (21) south, range seven (7) east; and the southwest quarter of the southwest quarter of section
21 thirty-six (36) in township thirty-seven (37) south, range five (5) east of Willamette meridian, containing eighty (80) acres.

The said last-mentioned tract is included within the limits of the Cascade Range forest reservation in Oregon, and being the owner, and desiring to select other land in lieu of said tract, I made and executed deeds of reconveyance thereof to the United States, on May 5th, 1899, and Oct. 28, 1898, respectively 1899, — as provided by the said act of June 4, 1897, which said deed has been recorded in the proper county and State. I therefore ask that a United States patent issue to me for the land hereby selected.

Witness my hand this 13th day of December, 1899.

C. W. CLARKE.

Post-office address c/o F. A. Hyde, 415 Montgomery St., San Francisco, Calif.

LAND OFFICE AT VISALIA, CALIF., *December* 14, 1899.

I, Geo. W. Stewart, register of the land office, do hereby certify that the land above selected, in lieu of land herein relinquished to the United States, is free from conflict, and that there is no adverse filing, entry or claim thereto.

GEO. W. STEWART, *Register.*

Selection approved by the Commissioner of the General Land Office, per letter "P" to register and receiver ——— — 189–. ——— Div. "P."

22 Application endorsed in typewriting on the back as follows:

This application is accompanied by the affidavit of A. Barion of San Francisco, Cal., as to the non-mineral character of the land herein selected.

The original deed from C. W. Clarke and wife to the United States of America, dated May 5th, 1899, recorded May 11th, 1899, in vol. 7 of deeds page 33, records of Crook county, Or., together with abstract of title to S. W. ¼ of S. W. ¼ of sec. 16, T. 21 S., R. 6 E. W. M., (a portion of the land used as basis for the within application) will be found on file with the application of C. W. Clarke to select, under the provisions of the act of June 4th, 1897, the N. E. ¼ of sec. 30, T. 15 W., R. 22 W., Missoula land district, Montana.

Original deed from C. W. Clarke and wife, to the United States of America, dated Oct. 28th, 1898, recorded Oct. 31st, 1898, in vol. 11 of deeds, page 296, records of Klamath county, Oregon, together with abstract of title to S. W. ¼ of S. W. ¼ of sec. 36, T. 37, S., R. 5 E. W. M., will be found on file in the office of the Commissioner of the General Land Office.

23 EXHIBIT G.

Filed April 16, 1902.

(Act June 4, 1897.)

Affidavit of Non-mineral Character and Non-occupancy.

45343.

U. S. LAND OFFICE, VISALIA, CALIFORNIA.

A. Barion, being duly sworn according to law, deposes and says: That he is over the age of 21 years, a citizen of the United States and of the State of California, and a surveyor by occupation and is well acquainted with the character of the following-described land and with each and every legal subdivision, thereof, to wit:

The south half of the northeast quarter of section four (4) in township twenty-nine (29) south, range twenty-eight (28) east, of Mount Diablo meridian, containing eighty (80) acres.

* * * * * * *

That the tract applied for is agricultural in character and contains no known deposits of coal or other minerals, and is not subject to entry under the coal or mineral land laws of the United States.

This affidavit is made upon the evidence found on the surface of the ground, deponent does not undertake to express any opinion as to what may be under the ground.

That he has frequently passed over the same and his personal

knowledge of said land is such as to enable him to testify
24 understandingly in regard thereto; that there is not to his knowledge within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel or other valuable mineral deposit; * * * that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, so far as deponent knows and that the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof and that his post-office address is 420 California St., San Francisco, Calif.

A. BARION.

I hereby certify that the foregoing affidavit was read to affiant before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified before me by —— ——) and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in San Francisco, California on this 13th day of December 1899.

HENRY P. TRICOU,

[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

25 EXHIBIT H.

Filed April 16, 1902.

(Act June 4, 1897.)

Affidavit of Non-mineral Character and Non-occupancy.

45343.

U. S. LAND OFFICE, VISALIA, CALIFORNIA.

A. Barion, being duly sworn according to law deposes and says: That he is over the age of 21 years, a citizen of the United States and of the State of California, and a surveyor by occupation and is well acquainted with the character of the following-described land and with each and every legal subdivision thereof, to wit:

The north half of the southeast quarter of section four (4) in township twenty-nine (29) south, range twenty-eight (28) east of Mount Diablo meridian, containing (80) acres.

* * * * * * *

That the tract applied for is agricultural in character and contains no known deposits of coal, or other minerals, and is not subject to entry under the coal or mineral land laws of the United States.

This affidavit is made upon the evidence found on the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground.

That he has frequently passed over the same and his personal knowledge of said land is such as to enable him to testify understandingly in regard thereto; that there is not to his knowledge
26 within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; * * * that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes (so far as deponent knows), and that the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof, and that his post-office address is 420 California St., San Francisco, California.

A. BARION.

I hereby certify that the foregoing affidavit was read to affiant before he signed his name thereto, that said affiant is to me personally known (or has been satisfactorily identified before me by —— ——) and that I verily believe him to be a credible person and the person he represents himself to be, and that this affidavit was subscribed and sworn to before me at my office in San Francisco, California, on the 13th day of December, 1899.

[SEAL.] HENRY P. TRICOU,
Notary Public in and for the City and County of San Francisco, State of California.

27 EXHIBIT I.

Filed April 16, 1902.

45343.

UNITED STATES LAND OFFICE,
VISALIA, CALIFORNIA, *January* 21, 1900.

Honorable Commissioner General Land Office, Washington, D. C.

SIR: I transmit herewith the application of C. W. Clarke to select under the act of June 4, 1897, the S. ½ of N. E. ¼ sec. 4, T. 29 S., R. 28 E. M. D. M.

I also transmit herewith * * * the affidavit of A. Barrion as to the character of the land selected.

In re deed of C. W. Clarke and wife to United States of tract surrendered and abstract of title thereto, see note on back of enclosed application.

The records of this office show the land selected to be free from conflict and subject to such selection.

Publication herein is ordered under circular of December 18, 1899.

Very respectfully, GEO. W. STEWART, *Register.*

28 EXHIBIT J.

Filed April 16, 1902.

45343.

UNITED STATES LAND OFFICE,
VISALIA, CALIFORNIA, *January* 22, 1900.

Honorable Commissioner General Land Office, Washington, D. C.

SIR: I transmit herewith the application of C. W. Clarke to select under the act of June 4, 1897, the N. ½ of S. E. ¼ sec. 4, T. 29 S., R. 28 E., M. D. M.

I also transmit herewith * * * the affidavit of A. Barrion as to the character of the land selected.

In re deed from C. W. Clarke and wife to the United States of tract surrendered and abstract of title thereto, see note on back of enclosed application.

The records of this office show the land selected to be free from conflict and subject to such selection.

Publication is ordered under circular of December 18, 1899.

Very respectfully, GEO. M. STEWART, *Register.*

29 EXHIBIT K.

Filed April 16, 1902.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARK, to Select the S. ½ of N. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. — M. and the N. ½ of S. E. ¼ of Sec. 4, T. 29 S., R 28 E., M. D. B. & M., under the Provisions of an Act of Congress Approved June 4, 1897.

45343.

To the register and receiver, United States land office, Visalia, California.

GENTLEMEN:—The undersigned, the Kern Oil Company, a corporation, duly organized and existing under and by virtue of the

laws of the State of California, respectfully protests against the application of said C. W. Clarke, to select the lands mentioned as S. ½ of the N. E. ¼ of sec. 4 and N. ½ of the S. E. ¼ of sec. 4, all in T. 29 S. R. 28, E., M. D. B. — M., under the provisions of an act of Congress, approved June 4th, 1897, and for cause of protest, shows as follows:

That on or about the 11th day of June, 1899, J. F. Elwood, H. M. Rodgers, Frank R. Lindsay, D. S. Snodgrass, V. I. Willis, F. M. Garrison, F. K. Wiseman and Geo. L. Hoxie, then being citizens of the United States, and over the age of twenty-one years, as an asso-
30 ciation of eight persons, made location of certain consolidated placer mining claims, under the laws of the United States, and which placer mining claims were known as the "Fossil" placer mining claim, being the N. E. ¼ of sec. 4 and the "June Bug" placer mining claim, being the N. ½ of the S. E. of ¼ said section 4, all in T. 29 S. R. 28 E., M. D. B. & M. At the time of making said locations, the locators thereof distinctly marked the boundaries of said placer mining claim, and each of them so that the lines could be readily traced, and built initial monuments and corner monuments, and set intermediate stakes between said corner monuments, so that any person going upon the ground could readily trace the lines, and posted notices of location on the claims, and each of them which notices contained a description of the claim, and the names of the locators, and the date of location, and which notice was recorded in the office of the county recorder of the county of Kern, a certified copy of which is hereto attached, and made a part hereof.

That at the time of making said locations, the locators thereof had made such discovery of mineral as to entitle them to make the said location, and thereupon, said locators entered into possession of said mining claims, and each of them, and worked and developed the same, and sunk wells upon said mining claims and each of them, and in sinking said wells discovered petroleum in paying quantities, upon each of said claims; which wells were respectively; on the June Bug placer to a depth of 122 feet; and on the Fossell placer to a depth of 130, and were prospect wells, sunk for the purpose of fully prospecting the said claims.

That immediately adjoining this land, and within 75 feet from the west line thereof, an oil well was sunk by the owner of the premises upon which the same was bored, and in sinking
31 said well, the oil sands and strata cont-ing the petroleum, was found at about the depth of one hundred and twenty feet.

That said oil sands continues to a depth at the present time of three hundred and eighty feet, and that the product of said well and the yield thereof, is at least twenty-five to thirty barrels of petroleum per day.

That on the north of said "Fossil" placer mining claim, and within fifty feet of the north boundary thereof, a well was sunk by the West Shore Oil Company, a corporation, and that the said company found oil sands at a depth of about one hundred feet, in its

live state, and a producer of petroleum, and at a depth of four hundred and fifty feet, said oil well will and is calculated to produce petroleum of at least twenty barrels per day. That the strata of oil sands underlying the placer mining claims hereinbefore set forth, are flat and horizontal and *is* what is known to miners as a blanket formation.

That the protestant herein is grantee of said lands by mean conveyance of said locator, and that this affiant has paid large sums of money for said placer mining claims, which purchase was made solely for the petroleum therein contained, and for no other purpose.

That said lands are now worth two hundred and fifty dollars per acre, for the petroleum therein contained, and have no value whatsoever, other than a nominal value for agricultural or grazing purposes, for the reason that said lands are not susceptible of irrigation, being above any possible ditch level that might be brought from the Kern river, which is the only means of irrigating or obtaining water to irrigate said lands.

32 That in conformation, the lands are precipitous and steep, deep ravines and gulches running through the same, and even if water could be brought upon the land, the same could not be retained for practical irrigation purposes. That said lands are sandy, desert lands, no vegetation growing thereon.

That this protestant has been in possession of said mining claims, and each of them, viz: That west half of each of them, and each of said locations, and is now, and has been for a long time past *been* the owner thereof. That this protestant has expended considerable money in developing the said claims and the premises so owned by them, for the petroleum therein contained, and to show the actual worth of the lands as petroleum land, and the same lies in one of the greatest petroleum belts in the State of California.

That the lands so selected by the said C. W. Clarke, and each of said applications, embraces lands now owned and possessed by this protestant, and that the said C. W. Clarke, at the time of making his said application, well knew the mineral character of the lands, and could have known the same if he had gone upon the premises. That the oil-bearing formation underlying these premises is flat and horizontal, and what is known to miners as a blanket formation.

That the said C. W. Clarke well knew the mineral character of said lands, but notwithstanding such fact, selected the same as agricultural lands, and caused one A. Barrion to make an affidavit setting forth certain facts, and striking out of said affidavit many material facts required by the Department of the Interior, to be made in selecting said lands. That at the time said A. Barrion, made said affidavit, (and the said Clarke selected said lands, upon

33 said affidavit), said Barrion stated that no mining operations were being carried on upon said lands, or any part thereof, and that in truth and in fact, on the east half of said Fossil placer mining claim, and on the south half of the northeast quarter of said

section four, there were derricks, machinery, tools, buildings, and appliances upon said placer mining claims, of the value of at least five thousand dollars, all of which matters and things said Barrion well knew, if he went upon the land, as said machinery and buildings were upon the highest point upon said lands.

This protestant represents to the honorable Commissioner of the General Land Office, that said C. W. Clarke, did not and could not have taken up said land for agricultural purposes and caused said affidavit to be made, except for the purpose of obtaining or endeavoring to obtain said mineral lands in violation of the rights given to settler under the act of June 4th, 1897.

That said lands have no value as agricultural lands, all of which matters and things said C. W. Clarke well knew, and that the application of said C. W. Clarke was made, as this protestant sets forth and believes, for the purpose of obtaining the mineral locations and mining claims owned by this protestant and in violation of the laws of the United States prohibiting the selection of mineral lands under the act of June 4th, 1897, all of which matters and things said C. W. Clarke must have known, if he went upon the premises or caused any person to go upon the premises as set forth in the affidavit on file in the Land Office.

34 And this protestant hereto attaches affidavits of J. M. Keith, Geo. L. Hoxie, W. E. Knowles, O. B. Phelps, Frank R. Lindsay, J. F. Elwood, showing the character of said lands and the value thereof for petroleum purposes, and makes such affidavits a part of this protest, and represents to the department that the persons making such affidavits are credible persons, to whom full faith and credit should be given in their statements as set forth in their said affidavits.

Your petitioner and protestant respectfully asks that the honorable Commissioner of the General Land Office consider the matters and facts set forth in this protest, together with the affidavits hereto attached, and that an order be made directing a hearing before the register and receiver of the United States land office at Visalia, California, which hearing shall be for the purpose of determining the character of the lands embraced within said S. ½ of N. E. ¼ and N. ½ of S. E. ¼ of said sec. 4, T. 29, S. R. 28, E., M. D. B. — M., and whether or not they are worth more for agricultural purposes than for the minerals therein contained.

And further, that this protestant may show to the honorable Commissioner of the General Land Office, that the application of C. W. Clarke is not making the said application in good faith but for speculative purposes, and for the purpose of perpetrating a fraud upon the Government of the United States.

All the matters and things set forth in this protest, this protestant avers and sets forth to be true.

And that your protestant will ever pray.

Dated this 3rd day of February, 1900.

KERN OIL COMPANY, *Corporation*,

[SEAL.] By JOHN M. KEITH, *President*,

H. P. BENDER, *Secretary*.

35 STATE OF CALIFORNIA, } ss:
County of Kern, }

H. P. Bender, being duly sworn, deposes and says: That he is the same H. P. Bender who signed the foregoing protest, and that he has read the same and knows the contents thereof, and that all of the matters and things therein set forth are true so far as it concerns any acts of said corporation, and so far as any matters or things set forth concerning other persons, this affiant believes it to be true.

H. P. BENDER.

Subscribed and sworn to before me, this 3rd day of February, 1900.

[SEAL.] M. R. CRAIG,
Notary Public in and for the County of Kern, State of California.

C. LINKENBACH,
Attorney for Protestant, Bakersfield, Cal.

36 *Notice of Location, Placer Claim.*

Notice is hereby given, that the undersigned, in compliance with the requirements of the Revised Statutes of the United States, have this day located the following-described placer mining grounds, viz:

Commencing at the northeast corner of section four (4) in tp. 29 S. R. 28 E., of Mt. D. M., thence west forty (40) chains to the ¼-section corner on the north line of said section. Thence south forty (40) chains to the center of said section. Thence east forty (40) chains to the quarter-section corner on the east line of said section. Thence north forty (40) chains to the point of commencement. Being the northeast quarter of said section, and containing one hundred and sixty acres.

This location is made by us as an association of eight persons in conformity with the laws of the United States, and the State of California, and for the purposes of claiming an developing oil, natural gas, and other and valuable minerals and water for mining and domestic uses.

This notice of location is posted about 400 ft. northeasterly from the southwest corner of said claim, situate in the county of Kern, State of California. This claim shall be known as the Fossil placer mining claim.

Located the 11th day of June 1899.

J. F. ELWOOD.
H. M. RODGERS.
FRANK R. LINDSAY.
D. S. SNODGRASS.
V. I. WILLIS.
F. M. GARRISON.
F. K. WISEMAN.
GEO. L. HOXIE.

37 Witnesses to posting of notice:

V. I. WILLIS.
D. S. SNODGRASS.
GEO. L. HOXIE.
FRANK LINDSAY.
H. M. RODGERS.
F. M. GARRISON.
J. F. ELWOOD.
F. K. WISEMAN.

I certify the foregoing to be a true copy of the original filed for record at the request of Wells, Fargo & Co. July 5th, 1899, at 10.15 a. m.

CHAS. A. LEE, *Recorder.*

STATE OF CALIFORNIA, } ss:
County of Kern, }

I hereby certify the above and foregoing to be a full, true and correct copy of the notice of location of Fossil placer m'n'g claim by J. F. Elwood, *et als.* on the 5th day of July, 1899, as the same appears of record in Book 15 of Min. Rec. at page 442 *et seq.*, Kern county record.

Witness my hand and official seal, this 1st day of Feb'y, 1900.

(I. R. stamp, 10.)

CHAS. A. LEE,
County Recorder of said Kern County,
[SEAL.] By C. S. MERONY, *Dep-ty.*

38 *Notice of Location, Placer Claim.*

Notice is hereby given, that the undersigned in compliance with the requirements of the Revised Statutes of the United States, have this day located the following-described placer mining ground, viz:

Commencing at the quarter-section corner on the east line of section four (4) in tp. 29 S. R. 28 E., of Mt. D. M. Thence west forty (40) chains to the center of said section. Thence south twenty chains to the southwest corner of the N. ½ of S. E. ¼ of said section. Thence east forty (40) chains to the S. E. corner of the N. ½ of S. E. ¼ of said section. Thence north twenty (20) chains to the point of commencement. Being the N. ½ of S. E. ¼ of said section four (4) and containing 80 acres.

This location is made by us as an association of eight persons in conformity with the laws of the United States and the State of California, and for the purposes of claiming and developing oil, natural gas, and other valuable minerals, and water for mining and domestic uses.

This notice of location is posted about 400 ft. southeasterly from the northwest corner of said claim, situate in the county of Kern, State of California.

This claim shall be known as the "June Bug" placer mining claim.

Located the 11th day of June, 1899.

J. F. ELWOOD.
H. M. RODGERS.
FRANK R. LINDSAY.
D. S. SNODGRASS.
F. M. GARRISON.
V. I. WILLIS.
F. K. WISEMAN.
GEO. L. HOXIE.

39 Witnesses to posting of notice:

V. I. WILLIS.	FRANK LINDSAY.
D. S. SNODGRASS.	F. M. GARRISON.
GEO. L. HOXIE.	J. F. ELWOOD.
H. M. RODGERS.	F. K. WISEMAN.

I certify the foregoing to be a true copy of the original filed for record at the request of Wells, Fargo & Co. July 5th, 1899, at 10.15 a. m.

CHAS. A. LEE, *Recorder.*

(*Certificate of County Recorder of Kern County, Dated Jan.* 26, 1900.)

STATE OF CALIFORNIA, } ss:
County of Kern, }

I hereby certify the above and foregoing to be a full, true and correct copy of the notice of location by J. F. Elwood *et als.*, of the June Bug placer mine on the 11th day of June, 1899, as the same appears of record in Book 15 of M'n'g Rec. at page 437 *et seq.* Kern county record.

Witness my hand and official seal, this 26th day of Jan. 1900.
(I. R. stamp 10.)

CHAS. A. LEE,
County Recorder of said Kern County,
[SEAL.] By C. S. MERONY, *Deputy.*

40 DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Select the S. ½ of N. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., and the N. ½ of S. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., under the Provisions of an Act of Congress Approved June 4th, 1897.

STATE OF CALIFORNIA, } ss:
County of Kern, }

J. M. Keith, being duly sworn, deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and a resident of the county of Kern, State of California. That he is manager for The Kern Oil Company, the "33" Oil Company and the Im-

perial Oil Company and other companies, working and operating petroleum mines and wells in what is known as the Kern River oil district, in the county of Kern, State of California, and in township 28, S. R. 28 E., M. D. B. M., and T. 29 S. R. 28 E., M. D. B. M.

That he attaches to this affidavit and makes it a part of the affidavit, a plat showing the exact locations of petroleum wells, that have been bored in the said townships, under his direct supervision and direction. With reference to said plat, there is noted "well 19," being on the S. W. ¼ of sec. 32, T. 28 S. R. 28 E., M. D. B. M., and that said well was bored under his direction and supervision, to a depth of six hundred and ninety-eight feet, and that the actual live petroleum strata and sands penetrated in this well are of a thickness of two hundred and thirty feet, and the same continues so far as this affiant can learn at the present time. That said
41 well will produce from twenty-five to thirty barrels per day. That "well 18" noted on said plat or map hereto attached and made a part of this affidavit, being on the N. W. ¼ of sec. 4, T. 29, S. R. 28 E. M. D. B. M., was bored under the supervision of this affiant, and is of about the same depth and same formation and the same production as "well 19," there being only a few hundred feet distance between said wells. That wells Nos. 10, 11, 12 and 13 noted on said plat and being in the S. E. ¼ of sec. 33, T. 28 S. R. 28 E., M. D. B. M., were all bored or drilled under the supervision of this affiant; and that said wells, will range in depth from five hundred and twenty feet to five hundred and fifty feet none being less than five hundred and twenty feet, and the oil sand so far penetrated in each of these wells is of a depth of from eighty to ninety feet, and at the present depth, the said wells will produce not less than twenty barrels of petroleum per each twenty-four hours, and some of them will produce petroleum at a much greater rate per day, and it may be safely said that each of said wells may be relied upon to produce at least twenty barrels of petroleum per each twenty-four hours. That he is well acquainted with the placer mining claims, situated in the county of Kern, knows as the "Fossil" placer mining claim, being the N. E. ¼ of sec. 4, T. 29, S. R. 28 E., and the "June Bug" placer mining claim, being the N. ½ of the S. E. ¼ of said sec. 4, T. 29, S. R. 28 E., M. D. B. M., and that the wells heretofore mentioned as having been drilled and bored under his supervision, are high upon the hills and above the level of said "Fossil" placer mining claim, and the "June Bug" placer mining claim, and taking it as a level from said wells, that, the oil strata and sands being flat or horizontal in formation, would be penetrated at a depth of
42 about 200 to 220 feet in said "June Bug" placer mining claim, and said "Fossil" placer mining claim.

JOHN M. KEITH.

Subscribed and sworn to before me, this 2nd day of February, 1900.

C. LINKENBACH,

[SEAL.] *Notary Public in and for Kern Co., Cal.*

(Map T. 28, S. R. 28 E., M. D. M.)

5—1264A

43 DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Select the S. ½ of N. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., and the N. ½ of S. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., under the Provisions of an Act of Congress Approved June 4th, 1897.

STATE OF CALIFORNIA, } ss:
County of Fresno, }

Geo. L. Hoxie, being duly sworn, deposes and says: That he is a citizen of the United States over the age of twenty-one years, and a resident of the county of Fresno, State of California. That he is civil engineer by profession and occupation, and has been for seven years last past, county surveyor of the county of Fresno. That he is one of the locators of certain consolidated placer mining claims, situated in the county of Kern, State of California, to wit: "June Bug" placer mining claim, being the N. ½ of S. E. ¼ of sec. 4, T. 29, S. R. 28 E., and the "Fossil" placer mining claim, being the N. E. ¼ of said sec. 4, T. 29, S. R. 28 E., M. D. B. M.

That at the time of making said locations, and each of them, the locators thereof, under the direction and supervision and assistance of this affiant, marked the boundary lines of each of said locations, so that the same could be readily traced upon the ground, and placed corner stakes at each corner of said claims, and inter-
44 mediate stakes, and built initial monuments upon each of said claims, and posted a notice of location thereon, describing the boundary lines of said claims, and the names of the locators, and the names of the claim and the date of location, that a true and correct copy of said notice so posted was recorded in the office of the county recorder of the county of Kern, State of California, that at the time of making said locations, and each of them, the locators thereof had made a discovery of mineral and petroleum within said boundary lines, of said locations, and which discovery was such as did lead them to continue and sink wells upon said locations, and each of them, and that the said locators did sink a well on said "June Bug" placer mining claim, during the month of June, and early part of July, 1899, to a depth of one hundred and twenty-two feet, and in sinking said well, found petroleum and penetrated the oil sand and strata containing bituminous matters and petroleum, and that the same was more than of extraordinary richness. That said well was bored and sunk at the expense of said locators, and that the said locators and their successors in interest have been in possession of said placer mining claims, and each of them from said date of location to the present time.

GEO. L. HOXIE.

Subscribed and sworn to before me this 3rd day of February, 1900.
[SEAL.] M. R. CRAIG,
Notary Public in and for Fresno Co., Cala.

45 DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Select the S. ½ of N. E. ¼ of Sec. —, T. 29 S., R. 28 E., M. D. B. M., and the N. ½ of S. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., under the Provisions of an Act of Congress Approved June 4th, 1897.

STATE OF CALIFORNIA, } ss:
County of Fresno, }

Geo. L. Hoxie, being duly sworn, deposes and says: That he is a citizen of the United States over the age of twenty-one years, and a resident of the county of Fresno, State of California. That he is a civil engineer by profession, and now holds the position of county surveyor of the county of Fresno, State of California.

That he made the annexed plat and map from surveys made by him of the premises therein referred to, and the said plat or map is a true and correct and accurate plat of the lands shown and described therein, and the said plat accurately shows the wells on said lands.

GEO. L. HOXIE.

Subscribed and sworn to before me, this 3rd day of February, 1900.

[SEAL.] M. R. CRAIG,
Notary Public in and for the County of Fresno, State of California.

46 DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Select the S. ½ of the N. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., and the N. ½ of S. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., under the Provisions of an Act of Congress Approved June 4th, 1897.

STATE OF CALIFORNIA, } ss:
County of Kern. }

Judson F. Elwood, being duly sworn, deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and a resident of the State of California. That he is one of the locators of the "June Bug" placer mining claim, being the N. ½ of the S. E. ¼ of sec. 4, T. 29 S. R. 28 E., M. D. B. M., and the "Fossil" placer mining claim, being the N. E. ¼ of said sec. 4 T. 29 S. R. 28 E., M. D. B. M. That he, as one of the locators of said "June Bug" placer mining claim, caused a well to be bored upon said placer mining claim, beginning in the latter part of June, 1899, and completed during the month of July of said year. That in boring said well, petroleum in large quantities was found and penetrated

at a depth of one hundred and twenty-two feet, and showed the lands to be of more than extraordinary value for petroleum mining. That this affiant and his grantees, to the knowledge of this affiant, have remained in possession of said placer mining claims, and each of them, working and developing the same, since the date of location, on the 11th day of June, 1899. That this affiant
47 has examined the surface indications of said "Fossil" placer mining claim carefully to ascertain the indications and the petroleum therein contained. That the same foundation exists and underlies the said "Fossil" placer mining claim, and underlies the said "June Bug" placer mining claim, and oil is obtained in the said "Fossil" placer mining claim, at about the same depth.

J. F. ELWOOD.

Subscribed and sworn to before me, this 1st day of February, 1900.

[SEAL.] M. R. CRAIG,
Notary Public in and for Kern Co., Cala.

48 DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Select the S. ½ of N. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., and the N. ½ of S. E ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., under the Provisions of an Act of Congress Approved June 4th, 1897.

STATE OF CALIFORNIA, } ss:
County of Kern, }

Frank R. Lindsay, being first duly sworn, deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and a resident of the State of California. That he is one of the locators of certain placer mining claims, made on the 11th day of June, 1899, to wit: "Fossil" placer mining claim being the N. E. ¼ of sec. 4 T. 29 S. R. 28 E., M. D. B. M. and "June Bug" placer mining claim, being the N. ½ of the S. E. ¼ of said sec. 4 T. 29 S. R. 28 E., M. D. B. M.

That at the time of making the said locations, and each of them, said lands were unoccupied and unappropriated public lands belonging to the Government of the United States.

That the boundary lines of each of said claims were so marked by the locators thereof, at the time of making said locations, that they could be readily traced upon the ground by any person going upon the premises. That some time during the month of June and early part of July, 1899, the locators of said "June Bug"
49 placer mining claim, caused a well to be sunk upon said claim at or near the center thereof, to a depth of one hundred and twenty-two feet, and that petroleum in paying quantities was found at a depth of one hundred feet, and that at the time said well was capped, petroleum in such quantities was found as to assure the

great value of said "June Bug" placer mining claim, for petroleum purposes. That during the month of July 1899, the locators of said "Fossil" placer mining claim, caused a well to be drilled or bored upon said placer mining claim, which work was done under the direct supervision of this affiant. That in drilling said well, oil and oil sands were first penetrated at a depth of about one hundred feet, and the said well was continued to a depth of one hundred and thirty feet, and at said depth of 130 feet, petroleum in such quantities was found as to assure the great value of said claim, for petroleum, mining, and would produce at least from three to four barrels of petroleum per day.

That by reason of the close proximity of said placer mining claims to the railroad, a well upon said claims that would produce from two to two and a half barrels per day would be a paying well.

That this affiant being one of the locators of the association *was* located the said consolidated placer mining claims as aforesaid, went into possession of the same until conveyance by them of the Elwood Oil Company, and this affiant as manager of the said Elwood Oil Company, remained in possession of the same until the conveyance by said Elwood Oil Company, to the part now owned by this protestant, and that thereupon, this protestant entered into possession of that part of said claim, which is described in the protest, to which reference is hereby made, and that the said Kern
50 Oil Company, has been in possession and has been the owner of said placer mining claims from that date to the present time.

That the oil-bearing strata and sand underlying each of these claims is flat and horizontal and as such is known to petroleum miners as a blanket formation, containing petroleum.

FRANK R. LINDSAY.

Subscribed and sworn to before me, this 2nd day of February, 1900.

[SEAL.] M. R. CRAIG,
Notary Public in and for Kern Co., Cala.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Select the S. ½ of the N. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., and the N. ½ of S. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., under the Provisions of an Act of Congress Approved June 4th, 1897.

STATE OF CALIFORNIA, } ss:
County of Kern, }

O. B. Phelps, being duly sworn, deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and a resident of the State of California. That he has been engaged
51 in examining lands in petroleum fields for the past twenty years, and also engaged in petroleum mining.

That he is well acquainted with certain placer mining claims, situated in the county of Kern, State of California, and known as the "June Bug" placer mining claim, being the N. ½ of S. E. ¼ of sec. 4 T. 29 S. R. 28 E., M. D. B. M.; also the "Fossil" placer mining claim, being the N. E. ¼ of said sec. 4 T. 29 S. R. 28 E., M. D. B. M. and knows the exterior boundaries of said claims, and each of them, of his own knowledge. That he has examined the surface ground, within the boundary lines of said claims, and each of them, and that on said examination he found sand and shale, containing bituminous matters and the residuum of petroleum in such quantities as would lead any petroleum miner to make further developements of the claims, and ascertain the production of petroleum therein contained.

That on or about the first of June, 1899, he went upon said "June Bug" placer mining claim, and there found a well being put down on said claim, at or near the center thereof, and that he made examination of the debris of sand and oil as being taken out of said well, in the work of sinking the same, and that the oil and sand that was being taken from the well showed that oil was found in considerable quantities.

That during the month of July, 1899, this affiant also went upon the "Fossil" placer mining claim, being the N. E. ¼ of said sec. 4,
and there found persons engaged in the operation of drilling
52 for oil on said placer mining claim; that in the operation of
drilling said well, shale and sand was being taken from said well, and the oil showed to be in considerable quantities, and was sufficient to show that the same was a paying well, and that the strata of oil sand was of extraordinary moisture, and of great value for petroleum mining.

That during the year 1899, under the supervision of this affiant, a well was sunk upon the northwest quarter of said sec. 4, in said township and range, a distance of about one hundred feet, from the west boundary line of said "Fossil" placer mining claim; that in sinking said well, at a depth of one hundred and twenty feet, oil and oil strata and oil-bearing sands were found, and oil was found to be in large quantities at that depth; and on further development of said well on said N. W. ¼ the product of the well would exceed twenty-five barrels of petroleum per day. That the oil strata and sand in which petroleum was found in said N. W. ¼ of said sec. 4 and near the line of said "Fossil" placer mining claim, is flat or horizontal and is what is termed by miners a blanket vein, and that the same being of a depth of near three hundred feet, could not otherwise than extend into and underlie the said "Fossil" placer mining claim, and the said "June Bug" placer mining claim, by reason of the close proximity of the same, and that the same strata was encountered by this affiant and the same oil found by this affiant, as was found by the persons engaged in drilling the oil well on said N. E. ¼ of said sec. 4 and N. ½ of the S. E. ¼ of said sec. 4. That from his experience in petroleum mining and in sinking and boring wells, and knowing the actual production of oil from the sands penetrated

in sinking the same, the said well upon the said "June Bug" placer mining claim, and the said "Fossil" placer mining claim, are
53 sufficient for him to say that the same are of more than extraordinary richness, and that the wells embraced within these lands, are of more than extraordinary richness for petroleum mining, and oil in great quantities underlying the same.

O. B. PHELPS.

Subscribed and sworn to before me, this 1st day of February, 1900.
[SEAL.] M. R. CRAIG,
Notary Public in and for Kern Co., Cala.

DEPARTMENT OF THE INTERIOR,
UNITED STATES LAND OFFICE, VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Select the S. ½ of N. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M.. and the N. ½ of the S. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. B. M., under the Provisions of an Act of Congress Approved June 4th, 1897.

STATE OF CALIFORNIA, } *ss:*
County of Kern, }

W. E. Knowles, being first duly sworn, deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and a resident of the State of California. That he is manager of the West Shore Oil Company, a corporation owning and developing the S. E. ¼ of sec. 32 T. 28 S. R. 28 E., M. D. B. M. Kern county, California.

That he is well acquainted with the "Fossil" placer min-
54 ing claim, being the N. E. ¼ of sec. 4, T. 29 S. R. 28 E., M. D. B. M., and that he as manager of said West Shore Oil Company, caused an oil well to be sunk on the S. E. ¼ of said sec. 32, about seventy-five feet from the north line of said "Fossil" placer mining claim, to a depth of about four hundred and fifty feet. That the oil well so sunk by him on said S. E. ¼ of said sec. 32 will produce not less than twenty-five barrels of petroleum per day. That the same shale and sand containing bituminous matters and the residuum of petroleum is found upon the said "Fossil" placer mining claim, as found upon the said S. E. ¼ of said sec. 32, and that the oil *stratas* and sands penetrated in boring said well is about two hundred feet in thickness. And at a depth of four hundred and fifty feet, the same continues to grow richer as further depth is attained, and that this affiant does not know the full depth of said oil strata at the present time.

That the same is horizontal in formation, and is what is termed by petroleum miners as a blanket strata of oil sands containing petroleum. That the near proximity of said well to the said "Fossil" placer mining claim, shows beyond a doubt that the same strata extends into the said "Fossil" placer mining claim, and underlies the same; the formation being flat, no other fact or theory could be

educed from the same other than the same strata of oil-bearing sand underlies said "Fossil" placer mining claim.

W. E. KNOWLES.

Subscribed and sworn to before me, this 1st day of February, 1900.
[SEAL.] M. R. CRAIG,
Notary Public in and for Kern Co., Cala.

(Endorsed:) # 127–128. U. S. land office. Visalia, Cal. Kern Oil Company *vs.* C. W. Clarke. Filed February 6, 1900. Geo. W. Stewart, register. C. Linkenbach, attorney for protestant, Bakersfield, Cal.

55 EXHIBIT L.

Filed April 16, 1902.

IN THE UNITED STATES LAND OFFICE
AT VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Enter the N. ½ of the S. E. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. M., under Act of June 4, 1897. Filed December 14th, 1899. 45343.

Come now, J. F. Elwood, H. M. Rodgers, Frank R. Lindsay, D. S. Snodgrass, F. M. Garrison, V. I. Willis, F. K. Wiseman, Geo. L. Hoxie, the Elwood Oil Company (a corporation) and the Bakersfield and Fresno Oil Company (a corporation), and file this their protest to the application of C. W. Clarke to enter the north half of the southeast quarter of section 4, township 29 south, range 28 east, Mount Diablo base and meridian, under the act of June 4th, 1897, and for grounds of contest and protest allege:

That long prior to the said application of said Clarke to wit, prior to December 14th, 1899, to select said land under said act above referred to, all of said land above described had been selected, located, occupied and possessed as a mineral claim, and was so owned and possessed at the time said application to select the same was made, and in that behalf protestants more particularly aver that heretofore, to wit, on or about the 11th day of June, 1899, the said lands above described were open, unoccupied lands of the Government of the United States, of mineral character and subject to location as mineral lands and mining claims under the laws of the United States, and on said day J. F. Elwood, H. M. Rodgers,
56 Frank R. Lindsay, D. S. Snodgrass, F. M. Garrison, V. I. Willis, F. K. Wiseman, and Geo. L. Hoxie, each of said persons being then and there a citizen of the United States, over the age of twenty-one years and in all respects competent to locate and claim mining property, did on and prior to said date discover mineral thereon, to wit, petroleum oil, in paying quantities, and did discover thereon a large and permanent strata of oil sand in place, containing and producing petroleum oil of great value, and the same was

of sufficient value, and the discovery of mineral on said lands was amply sufficient to warrant said locators or any other person or persons in the location of said claim, and in prosecuting the work of mining and developing the same for the production of petroleum oil, and having so discovered said claim and said land being open and unoccupied land of the United States and subject to location, as a placer mining claim, the said persons above named did locate the said land above described and did post in a conspicuous place on said land, to wit, at or near the points of discovery of said claim, a notice of the location of said land as a placer mining claim, to be occupied and developed as such mining claim in one group, and said notice so posted thereon did set forth that the name of said claim was the June Bug placer mining claim; that the names of the locators thereof were the persons above named, whose names were set forth in said notice; the date of the discovery thereof to wit: June 11th, 1899, and the description of the same as the north half of the southeast quarter of section 4, township 29 south, range 28 east, Mount Diablo base and meridian; that within thirty days from the date of said discovery, and on, to wit, July 5th, 1899, a similar notice of location was recorded in the office of the county recorder of Kern county, California, the county within which
57 said land was situated, and at the time of making said location, to wit, on June 11th, 1899, the location thereof duly marked the boundaries of said claim so that the lines of each of them could be readily traced on the ground, and built monuments of earth and rock at each corner of said claim and a strong and permanent stake was driven into the ground at each of said corners and into such oils of rock and earth, and such stakes were marked by letter and figures showing what corner of the claim the same was placed to represent and indicate, and placed intermediate monuments and stakes between said corner stakes so that the lines and boundaries of said claim were distinctly marked and any person going upon the ground could easily and readily trace the line of said claim, and said notice so posted as aforesaid contained the names of the witnesses to such posting, and within sixty days from the date of the discovery of said claim, the locators thereof performed labor thereon in developing the same, which said labor was equivalent to and largely exceeded ten dollars' worth of labor for each twenty acres, or fractional part thereof, contained in said claim, and said work consisted particularly in the erection of machinery and boring a vertical hole three and a half inches in diameter to a depth of 122 feet on said land, clearing a roadway necessary for the purpose of transporting tools and machinery on said ground for the purpose of developing same; and ever since the location of said claim, and on and including the date of the application therefor by said applicant the locators of said claim, their grantees and successors in interest, have remained in the open, quiet, peaceable and uninterrupted possession of said claim, and all and every part thereof, and are now developing, mining and improving the same, and are in possession thereof

with derricks erected thereon, drilling tools and other appli-
58 ances, for boring for oil, and are, and have been, actually engaged in boring upon said land, and developing the same for the production of mineral, to wit, petroleum oil, and after said location, and long prior to the application for said land by said Clarke, the said locators in the mining and developement of said mining claim sunk thereon an oil well which penetrated the oil sand to a depth of about thirty feet; that said oil sand was in place bearing and producing oil in large and paying quantities; and the oil flowed into said well and filled the same to a considerable depth, and exuded therefrom and flowed with the sands from said well, and demonstrated the existence of oil-producing sands and oil upon said claim in extraordinary and large and paying quantities, and the said well has a productive capacity of twenty to twenty-five barrels of oil per day and will produce a net profit of from fifteen to twenty dollars per day for the oil produced therefrom; that the oil sand penetrated lies practically horizontal under said land, and other wells can be sunk upon said land to the same or greater depth, and such other wells will produce like or greater quantities of oil, and with the single well now sunk thereon and on account of the oil produced therefrom, without the boring or further wells or further developements on said land the same is much more valuable for the production of mineral oil than for any agricultural or grazing purpose, and said land is worth, for the production of petroleum oil at present $250.00 cash per acre, and is utterly worthless for grazing or agricultural purposes, and the said land will produce, and is now producing oil, in large and paying quantities and is much more valuable for the oil now produced therefrom than for grazing or agricultural purposes.

That many other wells have been bored and completed, and many others are now in process of completion, in the vicinity
59 of said land, all of which demonstrate that the oil penetrated on the land in controversy is of the same strata and of the same value as that on such adjacent land, and a map showing such wells, the land in question, and the adjoining land, is hereto attached, marked Exhibit "A" and hereby referred to and made a part of this protest.

That after said Clarke filed his application to select said land, he conveyed the same, and all his interest therein, to one D. E. Alexander, and thereafter the said Alexander brought an action in the circuit court of the United States, ninth circuit, southern district of California, against one Charles A. Canfield, and others interested in said land, including these protestants, which said action was numbered 935 in the records of said court, and the same was brought to restrain the mineral claimants of said land from mining and developing the same, and in said action and upon a preliminary motion to have an injunction issue from said court restraining said defendants from further mining on said land, when the said matter came on for hearing the court appointed certain commissioners to bore an oil well upon said land near the well above referred to, for the pur-

pose of ascertaining if petroleum oil existed on said land. That said well was bored to a depth of 122 feet, and the same penetrated the oil sand to a considerable depth and petroleum oil flowed into said well in such quanitities as to demonstrate the great value of the said land for mineral purposes and thereupon said plaintiff appeared before the court in said action, and on or about the 5th day of February, 1900, dismissed his said action and abandoned all contest on said land and has made no further claim thereto.

60 That said land is situated in a very dry region of country, and four years out of five there is not sufficient rain thereon, or in the vicinity thereof, to produce crops or vegetation of any kind or character sufficient for any agricultural purpose or for grazing; that in rainy or unusual years when there is rain said land produces but very scanty vegetation and in quantities wholly insufficient for grazing purposes and will not at any time produce agricultural crops of any value. That all of said land is exceedingly rough, steep, covered with shale and other formations indicating the existence of petroleum oil in large and paying quantities therein and rendering said land wholly unfit and unsuitable for agricultural or grazing purposes, and the same is so situated that water cannot be brought thereon, nor can the same be in any way irrigated, as there is no water available for irrigating the same, and if water could be brought thereon the said land is so rough, uneven and precipitous, and so intersected with gulches, ravines, ridges and hills, that the irrigation thereof would be entirely impossible. That said land for more than twenty-five years last past has remained open, unoccupied, unclaimed and unsought land of the Government of the United States, and but for the discovery of mineral oil thereon never would have been sought for any purpose, and the purpose of said applicant to select said land under said act is solely and only to obtain the same for its mineral value and in order to mine the same, and deprive and defraud these contestants of their said lands.

That on and ever since the 11th day of June, 1899, the locators of said land, and these contestants and their successors in interest therein, have been, and now are, the owners of said land and entitled to the possession thereof, subject only to the paramount

61 title of the United States, and the possession and occupation of said locators and their successors in interest therein have been well, commonly, generally and extensively known in the neighborhood of said land, and *was* well known, as these contestants are informed and believe and therefore aver, to the said applicant at the time he sought to apply for and select the same under said act. That said land is not agricultural and is not worth anything and could not be sold for any price for agricultural or grazing purposes, but is totally worthless for any purpose other than mining and the production of mineral oil thereon, and on the day said application was made therefor under said act the same was not, nor was any portion thereof, subject to entry under said act, but the same was owned, seized and possessed and was in the possession of and occupied by said mining locators and their successors in interest,

and was withdrawn from entry or selection under said act. That said locators, after locating and acquiring title to said land, as hereinbefore set forth, and while the owners *and* in possession thereof, did, under proper deeds of grant, transfer and convey said land, and all their right, title and interest therein to these contestants, and these contestants are now the owners of said land and in the quiet, open and undisputed possession thereof, and are developing the same for mining purposes and the production of mineral oil thereon.

Contestants aver that the Elwood Oil Company and the Bakersfield and Fresno Oil Company, are now, and each of them is, and for more than three months last past has been, a corporation duly incorporated and existing as such under the laws of the State of California.

Contestants file herewith corroborative affidavits of the mat-
62 ters and things stated herein, and make the same a part hereof, and aver that they are holding said land as a mining claim and in good faith as mineral land, and they intend as rapidly as possible to proceed with the further developement of said land and in the production of mineral therefrom and are now mining and drilling thereon for the purpose of producing oil therefrom.

Wherefore, contestants pray that further proceedings relating to said application be suspended until further developements and operation shall have further demonstrated the mineral character and productive capacity of the same for mineral purposes; that upon a hearing — determination thereof, it be adjudged that these contestants are and were long prior to the application to select said land under said act the owners of and in possession thereof, and that the same was withdrawn from entry under said act, and that all of said land is of greater value for mineral than for agricultural or grazing purposes, and is not agricultural or grazing land.

FRANK H. SHORT,
Attorney for Protestants.

STATE OF CALIFORNIA, }
County of Fresno, } ss:

D. S. Snodgrass, F. M. Garrison and Geo. L. Hoxie, being first duly sworn, says: each for himself and not one for the other I am one of the contestants named in the foregoing contest and am interested in the land in controversy. I have read the said protest and know the contents thereof and the same is true of my own
63 knowledge except as to the matters therein stated upon information or belief, and as to those matters I believe it to be true. I have been engaged in mining, prospecting and developing oil lands for more than one year last past, and have personally been over, inspected and carefully observed each and every legal subdivision of said lands applied for by said applicant, and I am competent to express an opinion as to the character thereof, both for mineral and agricultural purposes; that said land is as stated in the foregoing protest utterly worthless for agricultural purposes and

will not produce crops and has no value for grazing purposes, and the same is very valuable for mineral purposes.

D. S. SNODGRASS.
F. M. GARRISON.
GEO. L. HOXIE.

Subscribed and sworn to before me this 10th day of February, 1900.

F. E. COOK, [SEAL.]
Notary Public in and for said County of Fresno, State of California.

STATE OF CALIFORNIA, } ss:
County of Fresno, }

V. I. Willis, A. B. Elmore and W. M. McKenzie, being first duly sworn, says, each for himself and not one for the other—that
64 he is a resident and inhabitant of the State of California, and has been for more than one year last past. That he is a citizen of the United States, over the age of twenty-one years and competent to be a witness; that he has read the foregoing contest of J. F. Elwood *et al.*, and knows the contents of the same and hereby refers thereto and makes the same a part of this affidavit, and avers that the matters and things stated therein are true.

That he is now and for more than one year last past has been, engaged in prospecting, locating and developing oil lands for the production of petroleum oil; that he has been upon and over all the lands described in said protest, and has carefully inspected the same, and each and every legal subdivision thereof; that said lands are sandy, covered with gravel, shale, rock, and other substances and the indications thereon demonstrate that said land is of great value for the production of petroleum oil and is utterly unsuited, unfit and of no value for agricultural or grazing purposes. That the matters stated in said protest as to the location, developement and productiveness of said land for mining purposes are true, and said lands are of great value, to wit, the present value of the same for mining purposes is $250.00 per acre, and upwards, and the same is not worth anything and could not be sold for any price whatever for agricultural or grazing purposes, and to the knowledge of affiant said lands were located by said locators, occupied and possessed, and are now and were on the 14th day of December, 1899, and long prior thereto, located, occupied, possessed, and were and are being developed in the manner stated in said protest for mining purposes.

V. I. WILLIS.
A. B. ELMORE.
W. H. McKENZIE.

65 Subscribed and sworn to before me this 10th day of September, 1900.

F. E. COOK, [SEAL.]
Notary Public in and for said County of Fresno, State of California.

STATE OF CALIFORNIA, } ss:
County of Fresno, }

W. H. McKenzie, being first duly sworn, deposes and says: That he is a citizen of the United States, a resident of the county of Fresno, State of California, over the age of twenty-one years and competent to be a witness. That he has resided in said Fresno county for many years, and for about two years last past has been engaged in the business of locating, leasing and developing oil lands in Kern county, California, and elsewhere;

That affiant was present on or about July 1st, 1899, when the oil well was completed, or about completed, on the north half of southeast quarter of section 4, in township 29 south, range 28 east, Mount Diablo base and meridian, and was informed by the persons who had bored said well that the same was down to a depth of about 120 feet. That affiant saw and personally examined the materials taken from said well; that said well was about four inches in diameter, and a considerable portion of the material taken therefrom, as affiant could tell by an examination thereof, and as he well knew from his experience, was oil sands, and was oil-bearing sand carrying oil and impregnated therewith, and it was apparent from such examination that oil in considerable " and valuable quantities had been taken from said well and in connection with said sand when the same was being bored, and that from the materials taken from said well it was apparent that oil sand had been encountered and bored through to a considable depth, and oil had been produced from said well, and by further developements would be produced therefrom in much larger and paying quantities.

That affiant was personally interested in and in part superintended the boring of a well on the southeast quarter of the northwest quarter of said section 4; that at the depth of 125 feet oil sands bearing oil, and which would have produced oil in paying quantities, to the extent of several barrels of oil per day, were encountered and bored through; that said well was proceeded with and sunk to a further depth of about 350 feet in the aggragate, and at that depth further strata of oil sands bearing oil in large and paying quantities were encountered and bored into, and said well produced and flowed large quantities of oil, and as examined and estimated by affiant, and as he would judge from his experience and examination of other and similar oil wells, the said well would produce 40 barrels of oil per day, or thereabouts, and the same is a very valuable and profitable producing oil well, and the indications are from the depths of oil sand passed through and the appearance thereof, that said well will continue to produce oil in said quantity, or approximate such quantity of oil for a very long time.

That affiant is thoroughly familiar with the said land, and the surrounding land, and states that the same is barren and utterly worthless for agricultural or grazing purposes, and that the same is of great value for the oil mineral which can be produced therefrom.

W. H. McKENZIE.

Subscribed and sworn to before me this 10th day of
67 February, 1900.

[SEAL.] F. E. COOK,
Notary Public in and for said County of Fresno,
State of California.

Endorsed: "Entered #127 in the United States land office at Visalia, California. In the matter of the application of C. W. Clarke to enter the N. ½ of S. E. ¼ of sec. 4, T. 29 S. R., 28 E., M. D. M. under act of June 4, 1897. Filed Feb'y 12, 1900. O. Scribner receiver."

EXHIBIT M.

Filed April 16, 1902.

IN THE UNITED STATES LAND OFFICE
AT VISALIA, CALIFORNIA.

In the Matter of the Application of C. W. CLARKE to Enter the S. ½ of the N. E. ¼ of sec. 4, T. 29 S., R. 28 E., M. D. M., under act of June 4th, 1897. Filed December 14th, 1899. 45343.

Comes now J. F. Elwood, H. M. Rodgers, Frank R. Lindsey, D. S. Snodgrass, F. M. Garrison, V. I. Willis, F. K. Wiseman, Geo. L. Hoxie, the Elwood Oil Company, (a corporation) and the Bakersfield and Fresno Oil Company (a corporation) and file this their protest to the application of C. W. Clarke to enter the south half of the northeast quarter of section 4, township 29 south, range 28 east, Mount Diablo base and meridian, under the act of June 4th,
68 1897, and for grounds of protest and contest, allege:

That long prior to said application, to wit, prior to December 14th, 1899, to select said land under said act above referred to, all of said land above described, and all of the northeast quarter of said section has been selected, located, occupied and possessed as a mineral claim, and was so owned, and possessed at the time said application to select the same was made, and in that behalf, protestants more particularly aver; that heretofore, to wit, on or about the 11th day of June, 1899, all of the northeast quarter of said section was unoccupied land of the Government of the United States, of mineral character and subject to location as mineral land and mining claims under the laws of the United States, and on said day J. F. Elwood, H. M. Rodgers, Frank R. Lindsey, D. S. Snodgrass, F. M. Garrison, V. I. Willis, F. K. Wiseman and Geo. L. Hoxie, each of said persons, being then and there a citizen of the United States, over the age of twenty-one years, and in all respects competent to locate and claim mining property, did, on and prior to said date, discover mineral thereon, to wit, petroleum oil, in paying quantities, and did discover thereon a large and permanent strata of oil sand in place, containing and producing petroleum oil of great value, and the same was of sufficient value, and the discovery of mineral on

said land was amply sufficient to warrant said locators, or any other person or persons, in the location of said claim, and in prosecuting the work of mining and developing the same for the production of petroleum oil, and having so discovered said claim, and said land being open and unoccupied land of the United States and subject to location as a placer mining claim, the said persons above named did locate the said land above described, and post in a
69 conspicuous place on said land, to wit, at or near the point of discovery of said claim, a notice of the location of said land as a placer mining claim, to be occupied and developed as such mining claim in one group, and said notice so posted thereon did set forth that the name of said claim was the Fossil placer mining claim; that the names of the locators thereof were the persons above named, whose names were set forth in said notice, and said notice contained the names of the witnesses to such posting, and the date of the discovery thereof, to wit, June 11th, 1899; and the description of the same as all of the northeast quarter of section 4 as above described; that within thirty days of the date of said discovery, and on, to wit, July 5th, 1899, a similar notice of location, being a copy of said notice was recorded in the office of the county recorder of Kern county, California, the county within which said land was situated, and at the time of making said location, to wit, on June 11th, 1899, the locators thereof duly marked the boundaries of said claim so that the lines of each of them could be readily traced on the ground, and built monuments of earth and rock at each corner of said claim, and a strong and permanent stake was driven into the ground at each of said corners and into such pile of earth and rock, and such stakes were marked by letters and figures showing what corner of the claim the same was placed to represent and indicate, and said locators also placed intermediate mounds and stakes between said corner stakes so that the lines and boundaries of said claim were distinctly marked and any person going upon the ground could easily and readily trace the lines of said claim; and within sixty days from the date of the discovery thereof the said locators performed labor thereon in developing the same, which
70 said labor was equivalent to and largely exceeded ten dollars' worth of labor for each 20 acres, or fractional part thereof, contained in said claim, and said work consisted particularly in the erection of machinery and boring a vertical hole three and a half inches in diameter to a depth of 120 feet, clearing a roadway for the purpose of transporting tools and machinery on said ground for the purpose of developing the same; and ever since the location of said claim, and on and including the date of the application therefor by said applicant, the locators of said claim and their grantees and successors in interest have remained in the open, quiet, peaceable and uninterrupted possession of said claim, and all and every part thereof and are now developing, mining and improving the same, and are in possession thereof with derricks erected thereon, drilling tools and other appliances for boring for oil, and are and have been actually engaged in boring upon said land and in developing the

same for the production of mineral to wit, petroleum, and after said location, and long prior to the application for said land by said Clarke, the said locators in the mining and developement thereof sunk thereon an oil well which penetrated the oil sand to a depth of about 20 feet; that said oil sand was in place bearing and producing oil in large and paying quantities, and the oil flowed into said well and filled the same to a considerable depth and exuded therefrom and flowed with the oil sands from said well and demonstrated the existence of oil producing sands and oil upon said claim in extraordinary and large and paying quantities, and said well has a productive capacity of 20 or 25 barrels of oil per day and will produce a net profit of from fifteen to twenty dollars per day for the oil produced thereon; that the oil sand penetrated lies practically horizontal under said land, and other wells can
71 be sunk upon said land to the same or greater depth, and such other wells will produce like or greater quantities of oil, and with the single well now sunk thereon and on account of the oil produced therefrom, without boring of further wells or further developements on said lands, the same is much more valuable for the production of mineral oil than for any agricultural or grazing purpose, and said land is worth for the production of petroleum oil at present $250.00 cash per acre, and is utterly worthless for grazing or agricultural purposes, and said land will produce, and is now producing oil in large and paying quantities and is much more valuable for oil now produced therefrom than for grazing or agricultural purposes.

That many other wells have been bored and completed, and many others are now in process of completion and will soon be completed, and in the vicinity of said land all of which demonstrates that the oil sand penetrated on the land in controversy is of the same strata and of the same value as that on such adjacent land, and a map showing such wells, the land in question and adjoining land, is hereto attached marked Exhibit "A" and hereby referred to and made a part of this protest.

That after said Clarke filed his application to select said land he conveyed the same, and all of his interest therein, to one D. E. Alexander, and thereafter the said Alexander brought an action in the circuit court of the United States, ninth circuit, southern district of California, against one Chas. A. Canfield, and others interested in said land, including these protestants, which said action was numbered 935 in the records of said court, and the same was brought to restrain the mineral claimants of said land from mining and developing the same, and in said action and upon a preliminary
72 motion to have an injunction issue from said court restraining said defendants from further mining on said land, when the said motion came on for hearing, the court appointed certain commissioners to bore an oil well upon said land near the well above referred to for the purpose of ascertaining if petroleum oil existed on said land. That said well was bored to a depth of 122 feet, and the same penetrated the oil sand to a considerable depth, and petro-

leum depth, and petroleum oil flowed into such well in such quantities as to demonstrate the great value of said land for mineral purposes, and thereupon said plaintiff appeared before said court in said action, and on or about the 5th day of February, 1900, on his own motion dismissed said action and abandoned all contests on said land and has made no further claim thereto and said mineral claimants are now proceeding with the developement of said land.

That all of said land is situated in a very dry region of country, and four years out of five there is not sufficient rain thereon, or in the vicinity thereof, to produce crops, or vegetation of any kind or character sufficient for any agricultural purpose, or for grazing, that in rainy, or unusual years when there is rain, said land produces but very scanty vegetation and in quantities wholly insufficient for grazing purpose and will not at any time produce agricultural crops of any value. That all of said land is exceedingly rough, steep, covered with shale, and other formations indicating the existence of petroleum oil in large and paying quantities therein, and rendering said land wholly unfit and unsuitable for agricultural or grazing purposes, and the same is so situated that water cannot be brought thereon, nor can the same be in any way irrigated, as there is no water
73 available for irrigating the same, and if water could be brought thereon the said land is so rough, uneven and precipitious, and so intersected with gulches, ravines, ridges and hills that the irrigation thereof would be entirely impossible. That said land for more than twenty-five years last past has remained open, unoccupied, unclaimed and unsought land of the Government of the United States, and but for the discovery of mineral oil thereon never would have been sought for any purpose, and the purpose of said applicant in selecting said land under said act is solely and only to obtain the same for its mineral value and in order to mine the same and deprive and defraud these contestants of their said lands.

That on and ever since the 11th day of June 1899, the locators of said land, and these contestants and their successors in interest therein, have been, and now are, the owners of said land and entitled to the possession thereof, subject only to the paramount title of the United States, and the possession and occupation of said locators, and their successors in interest therein has been well, commonly, generally, and extensively known in the neighborhood of said land and was well known, as these contestants are informed and believe, and therefore aver, to the said applicant at the time he sought to apply for and select the same under said act.

That said land is not agricultural and is not worth anything and could not be sold for any price for agricultural or grazing purposes, but is totally worthless for any purpose other than mining and the production of mineral oil thereon, and on the day said application was made therefor under said act, the same was not, nor was
74 any portion thereof, subject to entry under said act, but the same was owned, seized and possessed and was in the pos-

session of and occupied by said mining locators and their successors in interest, and was withdrawn from entry or selection under said act. That said locators, after locating and acquiring title to said land, as hereinbefore set forth, and while the owners and in the possession thereof, did under proper deeds of grant, transfer and convey said land, and all their right, title and interest therein to these contestants, and these contestants are now the owners of said land and in the quiet, open and undisputed possession thereof, and are developing the same for mining purposes and the production of mineral oil thereon.

Contestants aver that the Elwood Oil Company and the Bakersfield and Fresno Oil Company, are now, and each of them is and for more than three months last past has been, a corporation duly incorporated and existing as such under the laws of the State of California.

Contestants file herewith corroborative affidavits of the matters and things stated herein, and make the same a part hereof, and aver that they are holding said land as a mining claim and in good faith as mineral land, and they intend as rapidly as possible to proceed with the further developement of said land and in the production of mineral oil therefrom, and are now mining and drilling thereon for that purpose.

Wherefore, contestants pray that further proceedings relating to said application be suspended until further developements and operation shall have further demonstrated the mineral character and productive capacity of the same for mineral purposes; that upon a hearing and determination thereof, it be adjudged that these contestants are and were long prior to the application to select said land under said act the owners of and in possession thereof, and that the same was withdrawn from entry under said act, and that all of said land is of greater value for mineral than for agricultural or grazing purposes, and is not agricultural or grazing land.

75

FRANK H. SHORT,
Attorney for Protestant.

STATE OF CALIFORNIA, }
County of Fresno, } *ss:*

D. S. Snodgrass, F. M. Garrison, and Geo. L. Hoxie, being first duly sworn, says: each for himself and not one for the other, I am one of the contestants named in the foregoing contest and I am interested in the land in controversy. I have read the said contest and know the contents thereof and the same is true of my own knowledge except as to those matters therein stated upon information or belief, and as to these matters I believe it to be true. I have been engaged in mining, prospecting and developing oil lands for more than two years last past, and have personally been over, inspected and carefully observed each and every legal subdivision of said lands applied for by the said applicant, and I am competent to express an

opinion as to the character thereof, both for mineral and agricultural purposes that said land is as stated in the foregoing protest utterly worthless for agricultural purposes, and will not produce crops and has no value for grazing purposes, and the same is very valuable for mineral purposes.

D. S. SNODGRASS.
F. M. GARRISON.
GEO. L. HOXIE.

76 Subscribed and sworn to before me, this 10th day of February, 1900.

[SEAL.] F. E. COOK,
Notary Public in and for said County of Fresno, State of California.

STATE OF CALIFORNIA, } ss:
County of Fresno, }

V. I. Willis, A. B. Elmore, and W. H. McKenzie, being first duly sworn, says, each for himself and not one for the other, that he is a resident and inhabitant of the State of California, and has been for more than one years last past. That he is a citizen of the United States, over the age of twenty-one years and competent to be a witness; that he has read the foregoing contest of J. F. Elwood *et al.*, and knows the contents thereof and hereby refers thereto and makes the same a part of this affidavit, and avers that the matters and things stated therein are true. That he is now and for more than one year last past has been, engaged in prospecting, locating and developing oil lands for the production of petroleum oil; that he has been upon and over all the lands described in said protest, and has carefully inspected the same, and each and -very legal subdivision thereof; that said lands are sandy, covered with gravel, shale, rock and other substances, and the indications thereon demonstrate that said land is of great value for the production of petroleum oil and is utterly unsuited, unfit and of no value for agricultural or grazing purposes. That the matters stated in said protest as to the location, development and productiveness of said land for
77 mining purposes are true, and said lands are of great value, to wit, the present value of same for mining purposes, is $250.00 per acre, and upwards, and the same is not worth anything and could not be sold for any price whatever for agricultural or grazing purposes, and to the knowledge of affiant said lands were located by said locators, occupied and possessed, and are now and were on the 14th day of December, 1899, and long prior thereto, located, occupied, possessed and were and are being developed in the manner stated in said protest for mining purposes.

V. I. WILLIS.
A. B. ELMORE.
W. H. McKENZIE.

Subscribed and sworn to before me this 10th day of February, 1900.

[SEAL.] F. E. COOK,
Notary Public in and for the said County of Fresno, State of California.

UNITED STATES OF AMERICA.

STATE OF CALIFORNIA, } ss:
County of Fresno, }

G. W. Hensley, being first duly sworn, deposes and says: That he is a citizen of the United States, a resident of the county of Fresno, State of California, over the age of twenty-one years and competent to be a witness.

78 Affiant further says that he is a well-borer by occupation and that he has followed the business of boring wells for the last fifteen years. That on July 12th, 1899, he entered upon the northeast quarter of section 4, township 29 south, range 28 east, Mount Diablo base and meridian, situate in the county of Kern, State of California, and with his assistants did, on said quarter section and a short distance south and west of the center thereof, erect machinery and bore a well thereon for the purpose of developing mineral, to wit, petroleum oil, on said land, if any such mineral were thereon.

That affiant at said time bored a hydraulic well thereon about 4 inches in diameter and to a depth of 130 feet, and such well was completed on or about the 17th day of July, 1899. That in boring such well affiant penetrated oil sand in said land a distance of about 20 feet, and during all the time such well was being sunk through said oil sand petroleum oil in paying quantities, in the opinion of affiant, flowed out of said well with the water, and such oil was plainly discernible and was observed by affiant and those aiding him in said work, and the same continued to flow out of said well during all the time the oil sand was being penetrated, as aforesaid.

From the examination of said land and the boring of such well thereon, and observing the petroleum oil flowing from said well, as aforesaid, affiant states that said land above described is valuable for the minerals therein doposited, to wit, is valuable for petroleum oil, and that if a standard well were bored thereon petroleum oil in large and paying quantities and of great value would be developed thereon.

79 That affiant was employed by, and bored said well and did all of said work for, the Elwood Oil Company (a corporation) the successor in interest in said land of the mineral locators thereof said land having been heretofore located as a placer mining claim by certain citizens of the United States and the title thereto, after such location and before said well was bored by affiant, conveyed to the said corporation above named by such mineral locators thereof.

G. W. HENSLEY.

Subscribed and sworn to before me this 12th day of January, 1900.

[SEAL.] F. E. COOK,
Notary Public in and for said County of Fresno, State of California.

STATE OF CALIFORNIA, *County of Fresno,* } ss:

W. H. McKenzie, being first duly sworn, deposes and says; that he is a citizen of the United States, a resident of the county of Fresno, State of California, over the age of twenty-one years and competent to be a witness. That he has resided in said Fresno county for many years, and for about two years last past has been engaged in the business of locating, leasing and developing oil lands in Kern county, California, and elsewhere.

80 That affiant was present on or about July 1st, 1899, when the oil well was completed, or about completed, on the north half of the southeast quarter of section 4, in township 29 south, range 28 east, Mount Diablo base and meridian, and was informed by the persons who had bored said well that the same was down to a depth of about 120 feet. That affiant saw and personally examined the materials taken from said well; that said well was about four inches in diameter, and a considerable portion of the material taken therefrom, as affiant could tell by an examination thereof, and as he well knew from his experience, was oil sands, and was oil-bearing sand carrying oil and impregnated therewith, and it was apparent from such examination that oil in considerable and valuable quantities had been taken from said well and in connection with said sand when the same was being bored, and that from the materials taken from said well it was apparent that oil sand had been encountered and bored through to a considerable depth and oil had been produced from said well, and by further developments would be produced therefrom in much larger and paying quantities.

That affiant was personally interested in and in part superintended the boring of a well on the southeast quarter of the northwest quarter of said section 4; that at the depth of 125 feet oil sands bearing oil, and which would have produced oil in paying quantities, to the extent of several barrels of oil per day, were encountered and bored through; that said well was proceeded with and sunk to a further depth of about 350 feet in the aggregate, and at that depth further strata of oil sands bearing oil in large and paying quantities were encountered and bored into, and said well produced and

81 flowed large quantities of oil, and as examined and estimated by affiant, and as he would judge from his experience and examination of other and similar oil wells, the said well would produce 40 barrels of oil per day, or thereabouts, and the same is a very valuable and profitable producing oil well, and the indications are from the depths of oils and passed through and the appearance thereof, that said well will continue to produce oil in said quantity, or approximate such quantity of oil for a very long time.

That affiant is thoroughly familiar with the said lands, and the surrounding land, and states that the same is barren and utterly worthless for agricultural or grazing purposes, and that the same is of great value for the oil mineral which can be produced therefrom.

W. H. McKENZIE.

Subscribed and sworn to before me this 10th day of February, 1900.

[SEAL.] F. E. COOK,
Notary Public in and for said County of Fresno, State of California.

Endorsed: "Entered. #128. In the United States land office at Visalia, California. In the matter of the application of C. W. Clarke, to enter the S. ½ of the N. E. ¼ of section 4, T. 28 S., R. 28 E., M. D. B. M., under act of June 4th, 1897, filed December 14th, 1897. Filed, Feb'y 12, 1900. O. Scribner, receiver."

82 EXHIBIT N.

Filed April 16, 1902.

Before the General Land Office.

J. F. ELWOOD ET AL., Mineral Protestants,
vs.
C. W. CLARKE, Forest Lieu Selector. } 45343.

Involving forest lieu selected No. 127, for the N. ½ of S. E. ¼ of sec. 4, T. 29 S., R. 28 E., M. D. M., Visalia, California, land district.

Motion to Dismiss Protests.

Comes now C. W. Clarke, by his attorney, Horace F. Clarke, and moves that the Hon. Commissioner of the General Land Office do now dismiss that certain protest filed against his forest lieu selection No. 128, Visalia, California, series, on February 6, 1900, by the Kern Oil Company, and that certain protest filed against his said selection on February 12, 1900, by J. F. Elwood *et al.*, and bases this motion upon the following grounds, to wit:

1. That said protests fail to set up any cause of action against said selection.

2. That the mere general allegations in said protests contained, of the mineral character of the land involved are palpably based upon alleged discoveries of pretroleum upon neighboring tracks.

3. That said protests show upon their face, assuming all statements therein to be true, that but one discovery has been made upon the land involved, which comprises two forty-acre legal subdivisions.

83 4. That said protests are vague and indefinite.

5. That it is not alleged as a fact, under oath, that said Kern Oil Company is a citizen of the United States.

* * * * * * *

In view of all the foregoing, we pray that said protests be forthwith dismissed, and that said selection No. 127 be immediately passed to patent.

Respectfully submitted,

C. W. CLARKE, *Selector*,
By his attorney, HORACE F. CLARK.

84 EXHIBIT O.

Filed April 16, 1902.

Before the General Land Office.

J. F. ELWOOD ET AL., Protestants,
vs.
C. W. CLARKE, Forest Lieu Selector.

Involving forest lieu selection No. 128, for S. ½ of N. E. ¼ of sec. 4, T. 29 S., R. 28 E., M. D. M., Visalia, California, land district.

Motion to Dismiss Protests.

Comes now C. W. Clarke, forest lieu claimant, by his attorney, Horace F. Clarke, and moves that the Hon. Commissioner of the General Land Office do now dismiss the protests of J. F. Elwood *et al.*, filed against his forest lieu selection No. 128, Visalia, California, series, upon the following grounds, to wit:

1. Because the first protest filed is made without verification, by one signing himself as attorney for protestant, whose authority so to act is not shown.

2. Because said protests fail to state, positively and unequivalocally, that any petroleum or other mineral in appreciable quantities was ever discovered upon the land here involved, prior to the date of the selection in question.

3. Because the mere general allegations of the mineral character of the land involved are palpably based either upon alleged discoveries upon neighboring lands or upon discoveries made after the date of said selection.

85 4. Because it is practically admitted that the location of the so-called Fossil placer claim was void for want of an actual discovery of a mineral deposit thereon.

5. Because said protests are indefinite, vague and ambiguous, and set up no *facts* sufficient to constitute a cause of action.

* * * * * * *

We accordingly pray that said protests be forthwith dismissed and that a patent be at once issued upon said selection of Clarke.

Respectfully submitted,

SELECTION CLAIMANT,
By —— ——, *His Attorney.*

EXHIBIT "R."

Filed April 16, 1902.

* * * * * * *

"N." DEPARTMENT OF THE INTERIOR, H. G. P.
G. F. P. GENERAL LAND OFFICE,
WASHINGTON, D. C., *December* 18, 1900.

KERN RIVER OIL CO. *v.* C. W. CLARKE. } Selections under Act of June 4, 1897.

Register and receiver, Visalia, California.

SIRS: December 14, 1899, C. W. Clarke, claiming title to
86 lands in a forest reservation, filed in your office, in exchange for said lands, his two separate selections for N. ½ S. E. ¼ and for S. ½ N. E. ¼, sec. 4, T. 29 N., R. 28 E., M. D. M., which selections you duly forwarded to this office where they have been numbered 1772 and 1774 respectively. These selections cover adjoining tracts and involve the same questions and parties. They are to be considered as one case for the purposes of this decision for reasons which will hereinafter appear.

These selections are made under the following provision of the act of June 4, 1897, 30 Stats. p. 36.

That in cases in which a tract covered by an unperfected *bona fide* claim, or by a patent, is included within the limits of a public forest reservation the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government and may select in lieu thereof a tract of vacant land, open to settlement, not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected; *provided further*, that in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements and so forth are complied with on the new claims, credit being allowed for the time spent on the relinquished claims. By the circular of June 30, 1897, appoved by the Secretary of the Interior, regulations were prescribed for the purpose of carrying the provisions of said act into effect. May 9, 1899 and November 15, 1899 (amended December 18, 1899, 29 L. D. 395) the Secretary issued additional instructions, the former relating to selections on unsurveyed lands, the latter requiring publication under certain conditions of the selections. Under the circular of November 15,

1899, *supra*, notice of these selections was given, in response to which protests were filed in your office by the Kern River Oil Co. *et*
87 *al.* alleging the lands to be mineral and claiming them under mineral locations made prior to the date of said selections.

About the time these selections were made, it was represented to this office that the lands in this and a large number of adjoining townships were solely valuable for their petroleum deposits for which they had been located under the mining laws and for which they were being developed. It was further represented that the survey of the lands made over forty years ago, made no reference to mineral, and returned the lands as agricultural, that the lands remained unclaimed, under the agricultural laws until after their location as mineral, when parties sought to select the lands under the above act. Sufficient was presented to show the great importance of the issues involved and the necessity that prompt action be taken to preserve the rights of all parties, consequently, the lands in this and adjoining townships were suspended from disposition (the lands in this township being suspended by telegram to your office dated February 21, 1900) until after an examination of their character by special agents.

The above selections fairly represent the questions involved in a large number or cases which have been pending in this office, awaiting the result of the special agent's examination. The special agent has made a special report as to several selections including those under consideration.

Pending the determination by the proper tribunal of the question of the character of the land selected, some of the selectors sought the aid of the courts to have the mineral claimants enjoined from
88 taking and disposing of the oil, for which the mineral claims had proven of great value. As a result, this office has the benefit of two divergent decisions by the same court, which discuss the matters involved, so profoundly as to secure for them the largest measure of the consideration always given to the opinion of the courts. I am asked also to consider in this case elaborate briefs by counsel for both parties filed in other cases, and the comprehensive character of these briefs serves but to emphasize the importance of the questions involved.

You recommend that a hearing be ordered on the protests in these selections 1772 and 1774, which recommendation will be given due weight as will also the special agent's report hereinafter referred to.

The protests against these selections and the additional affidavits since filed in support thereof have been met in this office by a motion to dismiss the same, filed by resident counsel for the selector. It was stated by Judge Ross in the cases hereafter referred to, that the jurisdiction to determine the question of the character of the land, rested solely in the Land Department. See also Steel *v.* Smelting Co. 106 U. S. 447; Cornelius *v.* Kessel 128 U. S. 456; Ferrell *et al. v.* Hoge *et al.* 29 L. D. 12. It has also been held that oil or petroleum is a mineral and that lands chiefly valuable therefor cannot

be disposed of under agricultural laws. Union Oil Co., 25 L. D. 351; Phifer *v.* Heaton, 27 L. D. 57, and McQuiddy *v.* State of California, 29 L. D. 181, act Feb'y 11, 1897, 29 Stats. 526.

The material allegations of all the protests against these selections are believed to be embodied in the following extract from the protest of the Kern River Oil Co. filed against both selections:

89 That on or about the 11th day of June, 1899, J. F. Elwood, H. M. Rodgers, Frank R. Lindsay, D. S. Snodgrass, V. I. Willis, F. M. Garrison, F. K. Wiseman and Geo. L. Hoxie, then being citizens of the United States, and over the age of twenty-one years, as an association of eight persons, made location of certain consolidated placer mining claims, under the laws of the United States, and which placer mining claims were known as the "Fossil" placer mining claim, being the N. E. ¼ of sec. 4 and the "June Bug" placer mining claim, being the N. ½ of the S. E. ¼ of said section 4, all in T. 29 S., R. 28 E., M. D. B & M. At the time of making said locations, the locators thereof distinctly marked the boundaries of said placer mining claim-, and each of them so that the lines could be readily traced, and built initial monuments, and corner monuments and set intermediate stakes between said corner monuments, so that any person going upon the ground could readily trace the lines, and posted notices of location on the claims, and each of them, which notices contained a description of the claim, and the names of the locators, and the date of location and which notice was recorded in the office of the county recorder of the county of Kern; a certified copy of which is hereto attached, and made a part hereof.

That at the time of making said locations, the locators thereof had made such discovery of mineral as to entitle them to make the said location, and thereupon, said locators entered into possession of said mining claims, and each of them, and worked and developed the same, and sunk wells upon said mining claims and each of them, and in sinking said wells discovered petroleum in paying quantities upon each of said claims, which wells were respectively: on the June Bug placer to a depth of 122 feet; and on the Fossell placer to a depth of 130, and were prospect wells, sunk for the purpose of fully prospecting the said claims.

These selections are limited by law to lands "vacant and open to settlement." Whatever other meaning may be claimed for that phrase, it must be admitted that only non-mineral lands are subject to settlement and therefore, only such lands are subject to selection. It is the policy of the Government to reserve mineral lands, even in the absence of express reservation. Sec. 2318 R. S., Ivanhoe M. Co., Keystone M. Co., 102 U. S. 167, Keystone Lode and Millsite *v.* Nevada, 15 L. D. 259, State of Utah *vs.* Allen *et al.* (27 L. D. 53). Claimants under these selections must therefore be held to fall in the class of agricultural claimants as contradictinguished from mineral claimants.

90 As above stated, regulations were prescribed for claimants seeking the benefit of said act of June 4, 1897, *supra*, which, required the submission of certain proof. This proof has been

furnished in these cases. In addition to this, a non-mineral affidavit accompanies all selections. It is contended however, that this non-mineral affidavit is not required by the statute or by the regulations under this statute, and is wholly inapplicable to this class of cases. Since the year 1871, soon following the organization of the mineral division of this office, non-mineral affidavits of the present form have been required to be filed in all entries or filings for non-mineral lands. It has been required by the general circulars of the office down to and including the circular of July 11, 1899, and it is recognized as part of the proof in these selections, Secretary's instructions March 6, 1900, 29 L. D. 580. The non-mineral affidavit is to these selections what it is to the homesteader and what it is to every claimant for the public lands. It is universally recognized that claimants seeking title to the public lands will satisfy themselves as to the conditions, character and advantages of the lands they seek, whether it is vacant or adversely claimed or whether it is of the character subject to their claim. It is upon this affidavit that the claim is made. It is upon these representations, as much as upon the showing of their records, that the local officers accept the filing.

The following non-mineral affidavits filed in the above selections are made by the same person and follow the prescribed form, except the underscored portions have been interpolated by affiant who has crossed out the portions so marked.

91 [that there is no occupation of said land adverse to the selection thereof under the act of June 4, 1897, by]* That the tract applied for is agricultural in character and contains no known deposits of coal, or other minerals, and is not subject to entry under the coal or mineral land laws of the United States; *this affidavit is made upon the evidence found on the surface, of the ground. Deponent does not undertake to express any opinion as to what may be under the ground.*

That he has frequently passed over the same and his personal knowledge of said land is such as to enable him to testify understandingly in regard thereto; that there is not to his knowledge within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; [that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise;]* that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, *so far as deponent knows;* and that the above and foregoing statements as to the character of said land apply to each and every legal subdivis-

[* Words enclosed in brackets erased in copy.]

ion thereof, and that his post-office address is *420 California St., San Francisco, California.*

(Signed) A. BARION.

A careful reading of this affidavit discloses the purposes of the defense. It is practically admitted that mining claims cover the land but it is denied that mineral had been discovered at the date of filing the selection in the local office and because of this that the mining claims are no bar to the selection, and that the conditions known to exist at that date determine the rights under the selection. In other words, it is contended that under the act of June 4, 1897, a vested right attached at date of selections which a subsequent discovery of mineral could not defeat. This point is the keystone of the entire structure, and upon it the selectors and their successors in interest rest their case.

In the case of The Olive Land and Developement Company *v.* Olmstead, *et al.* 103 Fed. Rep. 568, which was a suit to quiet title to a selection under said act against one claiming under a mining location, Judge Ross held, July 9, 1900:

92 In all cases the land authorized to be selected in lieu of that relinquished is required to be vacant and open to settlement. When? Manifestly at the date of selection. It is upon its then character and condition, that the selector has the right and is bound to act. Before making his selection he must inform himself of the character and condition of the tract desired, but it would be wholly unreasonable to say that he is required to make a selection based upon what may be disclosed in that regard in the future. The right to select is by the statute given to the party invited by the Government to make the exchange, without other condition than that the land selected shall be vacant and open to settlement.

In the similar case of The Cosmos Exploration Company *et al. v.* Gray Eagle Oil Company *et al.* 104 Fed. Rep., Judge Ross held, Sept. 24, 1900, referring to his former decision, that:

In the main what was then said is correct even as applied to the facts, statutory provisions and rules and regulations of the Land Department presented in the present cases; * * *

As has been stated, it did not appear in the case of Olive Land and Developement Company *v.* Olmstead that any rules or regulations had ever been made pursuant to the provisions of the act of June 4, 1897. * * * In the absence of all rules and regulations upon the subject the court treated and I think properly treated such acceptance as an approval of the selection. * * * The selection as has been seen consists of two things. First, the act of selection upon the part of the selector, and second, the approval of his selection by the Land Department. Both acts are essential to constitute the selection authorized by the statute. * * * (The court here proceeds to consider the rules and regulations.) * * * The rules and regulations mentioned are in no respect inconsistent with the provisions of the statute, are reasonable and are therefore valid and have the same force and effect as statutory provisions.

From then it is clear that the officers of the local land office are not empowered to approve any selection under the act of June 4, 1897, but are expressly required to refer the questions in respect to the condition and character of the land sought to be selected to the General Land Office for consideration and that there the power rests to determine the second of the two essential things necessary to constitute a selection under the act of June 4, 1897, viz. whether the land sought is vacant and open to settlement.

This latter opinion of the court was the opinion of the department February 28, 1900. A. J. Harrell 29 L. D. 553, when it held referring to the character of the land and adverse claims.

These matters will remain open to inquiry and determination by the Land Department in a proper way as in other cases arising under the public land laws, until the issuance of patent. * * *

93 The exchange becomes complete, in contemplation of law, upon the approval of the selection and it ought not to have been disturbed in a manner different from that in which a final entry would be disturbed.

But it is contended that the later ruling of the department in the cases of Gideon F. McDonald 30 L. D. 124 and Clarke *v.* N. P. R. R. Co. 30 L. D. 145, should govern in this case. That ruling is as follows:

By his deed of relinquishment and reconveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the Government contained in the act of June 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the Government into a contract fully executed upon his part, and in the execution of which by the Government he had a vested right.

I am not convinced that counsel has correctly interpreted these later decision- of the department or that they conclude this office from considering the question.

The court referred to said decision when it held that "the exchange once made" could not be rendered nugatory by any future discovery of mineral.

It is contended that the act of relinquishment and the act of selection must be contemporaneous, under the ruling of the department, that one cannot be made without the other, that therefore the rights under the selection must be the date *of* the relinquishment is filed in the local office with the selection, that it cannot be treated as an "application to select" but is an actual selection the mere filing of which vests the right of the selector in the land selected. This is not the reasoning in the Cosmos and Harrell cases *supra*. In Departmental Instructions of June 30, 1897, it is designated as an application for change of entry or settlement which "must be forwarded by the local officers to the Commissioner of the General Land Office, together with report as to the status of the tract applied for." It is thus seen that the

presentation of a selection application to the R. and R.
94 is not that it shall be filed there, or that its regularity or validity shall be passed on, but merely that it shall be transmitted to this office, where it shall in the first instance be examined and an ascertainment had as to whether all the requirements, both of the law and regulations have been met, and this is evidenced by an approval. The act of Congress of June 6, 1900, 31 Stats. abridging the right to make selections under said act of June 4, 1897, *supra*, after October 1, 1900, to surveyed lands, construes the filing in the local office as an application by providing that nothing therein contained "shall affect the rights of those who previous to October first, nineteen hundred shall have delivered to the United States, deeds for lands within forest reservations and make application for specific lands in lieu thereof." The department also considered the forms under which it is required that the selections be approved by this office, and of which the local officers and parties must be advised. In Cornelius *v.* Kessel, 128 U. S. 456, cited by Judge Ross in the Cosmos case, it is held:

The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land office in the disposition of the public lands undoubtedly authorizes him to correct and annul entries of land allowed by them where the lands are not subject to entry or the parties do not possess the qualifications required. * * * But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exercised only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for.

There can be no question that this is an entry in the same sense that every filing for public land is an entry, but that it is a final entry is no more true than that a homestead application, when filed in the local office, is a final entry. It is admitted by all parties that
one who enters public land is entitled to a patent only when
95 he has done all that he is required to do under the provision of law through which he seeks title. When this is done, his rights vest and the conditions then existing fix the status of the land and that is all there is in the numerous citations by counsel on this point. It should, however, be noticed that usually the fact that all the requirements have been complied with is evidenced by the issuance of a certificate of entry, while in these cases, the evidence of that fact is the approval of the selections by this office.

From what has heretofore been said it is seen that those claiming under the act of June 4, 1897, *supra*, have not done all they are required to do until they have filed the proof required, made proof of the publication of notice and the same has been approved by this office. This is the only reasonable and equitable course possible under the law and has the support of the court in the Cosmos case *supra*. In the face of the ruling of the department in the Harrell case, and in view of the fact that the court did not find the McDonald and Clarke cases inimical to this ruling, I am not convinced that

the department, in those later cases intended that the principle therein enunciated, should govern in cases where the question of the character of the land is involved.

There the question was whether the right to a selection could be defeated by a subsequent withdrawal of the land, here the question is between two claimants as to the character of the land. The analogy between a homestead entry and these selections, in this particular, is complete in that the homestead entry "appropriates and segregates" the land but does not fix its character until the entryman has done all that he is required to do and has received his
96 final certificate, so in these selections, until the selector has complied with the requirements of the department, he cannot be said to have done all he is required to do, if so, he could with just as much reason, refuse to furnish the required proof of publication of notice because not required by statute, and claim his patent because he had filed his selection.

Applications to make entry under section 2306 U. S. R. S. also furnish an analogy to this case. There the application is filed in the local office where it is noted upon the record, and forwarded to this office. The proof is here examined and if found sufficient, it is approved and the local officers directed to allow the issuance of final certificate. Until this is done the land is open to exploration under the mining laws.

If further reasons were necessary for the holding herein it might be contended that, as in the case of State and railroad grants, the character of land, selected either by a State or railroad in lieu of land lost under its grant is open to question until patent has issued or certification where patent is not required. Barden *v.* U. S. 154 U. S. 288, Mullan *v.* — 118 U. S. 271, Swank *v.* State of California, 27 L. D. 411, McQuiddy *v.* State of California, 29 L. D. 181.

Under this ruling, therefore, the land in these selections is yet open to exploration under the mining laws and if at this date the lands are shown to be mineral it defeats the selections. The opinion of this office expressed in the last annual report and referred to by the selectors in support of their position, cannot be taken as governing the office in the present case. It was a recommendation, only for further legislation, and the McDonald case therein cited did not, as heretofore stated, involve a consideration of
97 facts, as now presented.

But even the claim of the selector's resident counsel that there was no discovery at date of selection and that therefore his right attached at that date, is met by specific affidavits. The presumption in favor of the selection, arising from the character of the tract as shown by the records of the local land office, is weakened by the affidavits of the mineral claimants to the contrary, especially as that presumption rests upon the affidavit of Barion. Affidavits are on file alleging:

That he, as one of the locators of said "June Bug" placer mining claim, caused a well to be bored upon said placer mining claim beginning in the latter part of June, 1899, and completed during the

month of July of said year. That in boring said well, petroleum in large quantities was found and penetrated at a depth of one hundred and twenty-two feet, and showed the lands to be of more than extraordinary value for petroleum mining. (From Hoxie's affidavit.)

That during the month of July, 1899, the locators of said "Fossil" placer mining claim caused a well to be drilled or bored upon said placer mining claim, which work was done under the direct supervision of this affiant. That in drilling said well, oil and oil sands were first penetrated at a depth of about one hundred feet, and the said well was continued to a depth of about — hundred and thirty feet, and at said depth of 130 feet, petroleum in such quantities was found as to assure the great value of said claim, for petroleum mining, and would produce at least from three to four barrels of petroleum per day. (From Lindsay's affidavit.)

But selector's resident counsel contends that if there was a discovery upon the Fossil claim it was not upon the S. ½ N. E. ¼, included therein, and that if there was a discovery upon the June Bug claim, the failure to designate upon which subdivision it is situate, defeats the claim. Counsel cannot pretend to believe that more than one discovery is necessary in a claim, whether that claim contain 20 acres or 160 acres, or that the discovery must be upon any particular legal subdivision.

It is held that one discovery upon a claim, whether it be of twenty acres or of one hundred and sixty acres is sufficient to authorize a placer location thereof, but in neither case is it held either
98 directly or by intendment that such discovery is conclusive as to the mineral character of the entire claim or that all the land therein can be acquired as appurtenant to the mineral deposits in the portion containing the discovery. Ferrell *et al. v.* Hoge *et al.* 29 L. D. 12.

See also Union Oil Co., 25 L. D. 351.

To determine the mineral character of the entire claim requires a hearing where proof may be taken, the right to which selector's counsel seeks to deprive the mineral claimants who are entitled to be heard and to have their claims protected, if the allegations of the protest are established to be true. But the selector seeks to evade the effect of the allegations of the mineral claimants, by drawing a distinction between "known mines" and "mineral lands" and expends much effect and cites numerous decisions of the court and the department in the attempt. But this is a distinction without a difference. Since the pre-emption act of 1841, wherein the words "known mines" occur, to the act of 1891, repealing said pre-emption act and down to the present time, all mining legislation and the construction thereof by the courts and the Land Department have uniformly recognized that lands containing "valuable mineral deposits" are excepted from disposition, except under the mining laws. Nor can there be any question that the lands must be known to be mineral when the right to a patent vested and that the subsequent discovery of mineral would not defeat such right.

But the selector would give to the word "known" some unusual power in establishing the character of the public lands and attempts to lay down the rule citing many decisions in support thereof, that the land must contain known mines which are being developed at the date the right to a patent vested. Mining locations are not made upon known mines, and to require such a showing would
99 make all mining locations void and render invalid many mineral patents which are being daily issued by this office. The prospector and miner "upon invitation of the owner of the land, the United States" finds indications of the existence of minerals in sufficient quantities to make the lands chiefly valuable therefor, and thereupon locates it as mineral land, and

One who is in actual possession of a mining claim, working it for the minerals it contains and claiming it under the laws of the United States whether the location under which he so claims is valid or invalid cannot be forcibly, surreptitiously, clandestinely or otherwise fraudulently intruded upon or ousted while he is asleep in his cabin or temporarily absent from his claim.

Nevada Sierra Oil Co. *v.* Home Oil Co. 98 Fed. Rep. 673, see also Cosmos case, *supra*, Atherton *v.* Fowler, 96 U. S. 513, Haws *v.* Victoria C. M. Co. 160 U. S. 303.

The indications that may be made the basis for a mining location are not to be confounded with the proof required as to the existence of mineral when the question of the character of the land is in contest. In the former, slight evidence of the existence of mineral is sufficient, but in the latter, it must be shown that the mineral thereon makes the lands clearly valuable therefor. The ruling that has become a settled principle in the matter of determining the relative character of lands in contest is found in the following language in a leading case:

After a careful consideration of the subject, it is my opinion, that where minerals have been found and the evidence is of such a character that a person of ordinary prudence will be justified in further expenditure of his labor and means, with a reasonable prospect of success in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby "all valuable mineral deposits in the land belonging to the United States" are declared to be free and open to exploration and purchase, for if as soon as the minerals are shown to exist and at any time during the exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in attempting to bring to light and make available the mineral wealth which lies concealed in the bowels of the earth, as Congress must have obviously
100 intended the explorer to have an opportunity to do. (Castle *v.* Womble 19 L. D. 455.)

This is in line with Davis Adm'rs *v.* Wiebbold, 139 U. S. 507 characterizing lands as mineral which are known to be so valuable

as to justify expenditure for their extraction. Also John Downs, 7 L. D. 71. The mining claim need not show any profits to have the land stamped as mineral, Caledonia M. Co. *v.* Rowen, 2 L. D. 714, see also Royal K. Placer 13 L. D. 86. Johns *vs.* March 15 L. D. 196, Rucker *v.* Kuiseley 14 L. D. 113, Brown *v.* Schmidt, Sec't'y, March 16, 1896, Chatham *v.* State of California, Sec't'y July 21, 1899, Magruder *v.* O. & C. R. R. 28 L. D. 171, Mike Starr M. Co. 143 U. S. 394. Congress has also given a construction to this question in the act of February 26, 1895, 28 Stats. 683, providing for the segregation of mineral lands in certain limits of the N. P. R. R. Co.

That all lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation and purchase, and under the provisions of the United States mining laws, and the Commissioner, in making the classification hereinafter provided for shall take into consideration the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands to be examined and classified, or the lands adjacent thereto, and the reasonable probability of such land containing valuable mineral deposits because of its said formation, location or character * * * provided that the word "mineral," where it appears in this act, shall not be held to include iron or coal.

These mineral claimants made mining locations of these lands much as the above commissioners classified lands as mineral, but they did not rest their claims upon the discoveries claimed to have been made. In the wells that within a reasonable time after location were sunk to a depth of at least 122 feet, the mineral claimants proved their professional judgment, and there are now on file in this office affidavits supported by photographs showing that on land including a portion of each of these mining claims there are seven wells ranging down in close proximity from a depth of 760
101 feet sunk at a cost of $3672 "with a daily production of 135 barrels." It does not seem that any question could arise as to who had the best right to this land and to whom the mineral product belongs. Even if no wells had been sunk at the date of the selections and the mining claimants had rested solely upon the surface discoveries but were duly proceeding with reasonable diligence to develop the claims, the agricultural claimants would not have been entitled to the land as "vacant land open to settlement." On this point in the Cosmos case *supra* Judge Ross held:

It is, to say the least, doubtful if persons authorized to select vacant land only, are authorized to select lands in the actual *bona fide* occupancy of others under the settlement laws, or under a mining location, even though, in the case of the latter, the location be invalid by reason of the absence of a valid discovery of mineral (Shaw *vs.* Kellogg, 170 U. S. 312, 332); but they are certainly not authorized to effect such selection by any sort of fraud or circumlocution. Nevada-Sierra Oil Co. *vs.* Home Oil Co., 98 Fed. Rep. 673, 680.

If the lands are not distinctly agricultural in character but in addition contain on the surface mineral indications, justifying a dis-

creet person to prospect and develop the same, then the affidavit which avers: "that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes so far as the deponent knows," is not only evasive but misleading and evidences a motive for acquiring the lands really for mineral and not for agricultural purposes.

The peculiar formation of this mineral deposit and the difficulties that are met with in the application of the mining laws to these different conditions are fully appreciated but I am convinced that if the mining laws are given the broad and liberal interpretation intended for them and especially if it be disclosed that mineral oil conditions can be and are determined by certain fixed surface indications they will be found sufficient for these cases which have arisen since their creation and which could not possibly have been foreseen. This was evidently the opinion of Congress when (Feb'y 11, 1897, 29 Stats. 526) it provided:

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That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils and chiefly valuable therefor under the provisions of the laws relating to placer claims.

In the matter of the petroleum formation, I am impressed with the views of one of the mineral claimants' attorneys, which is in part as follows:

Science has taught me that if I found this quartz formation between true defined walls, it would lead me to a large body of ore, gold, silver, or copper, according to the conditions of the ore. So it is with the petroleum miner; no man who has ever known of the petroleum fields has ever known petroleum to be in large and paying quantities upon the surface. The nature of the mineral itself is such that it is against common sense, reason or science to hold that before a petroleum miner can make a location, he must have an oil well which will produce from 30 to 75 barrels of petroleum per day. No such thing exists; no such thing has or ever will exist, but the petroleum miner as he goes and takes up his location, takes it up in good faith upon the indication that he has found upon the surface.

Science has taught me that invariably where these evaporations have occurred and the residuum of petroleum has been left upon the surface, there have been and still are large quantities of petroleum beneath. The reason for this is that in connection with petroleum usually, large quantities of gas *is* found; they are akin to each other, and by this means petroleum has been forced to the surface and gives the petroleum miner what is the same as to the quartz miner, a lead going to a large and rich body which lies underneath.

The good faith of the mineral claimants is apparent and conclusive. They seek to obtain, in a proper manner, title to lands under laws solely provided therefor; I do not find the same conditions existing in the case of the agricultural claimant, who evasively seeks to acquire mineral lands under agricult-

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ural laws, the lands being admittedly mineral and not agricultural. In the Cosmos and Olive cases, *supra*, the selectors, claiming under laws that permitted the disposition of the non-mineral lands only, sought to have mineral claimants enjoined from producing oil from mining claims which their predecessors had located in good faith and which they had developed at great cost. And this as to lands which had apparently possessed but little inducement for the agricultural claimant. In other words, the selector, without cost or labor to himself, seeks to reap where others have sown, a claim to which equity gives its unqualified dissent, Cosmos case *supra*, see also Atherton *v.* Fowler, 96 U. S. 513, Rector *v.* U. S. 92 U. S. 698.

The above selections cover land surveyed August 6, 1854, and returned as "undulating with a fair 2″-rate soil to first-rate soil along Kern river." Of this section 4, during all this time, only 80 acres have been entered upon the records under any of the public land laws. These mining claims were located in June 1899, but despite that fact, in December 1899, this selector of agricultural lands comes to the Land Department with affidavits in all material respects similar to those which the court pronounced palpably false and seeks its sanction and support in his efforts to secure what equity has denied claimants in other cases. He disingenuously argues that although these mining claims contained evidences of mineral, they did not produce it in paying quantities, and, therefore, the mineral products subsequently obtained, often in such marvelous quantities, belonged not to the mineral claimant who had produced them but to the agricultural claimant who had stood by. The motive is obvious and when, as in this case, it seeks to vio-
104 late the right of another it may be considered. Cosmos case *supra*, U. S. *v.* Culver, 51 Fed. Rep. 81, Hanchett *v.* Chitovich 101 Fed. Rep. 942.

The act of June 4, 1897, may have been intended to be remedial, but it cannot have been intended to be an instrument for the usurpation of property rights. It may be a standing offer to exchange lands in a forest reserve for vacant lands open to settlement, but it does not contemplate the seizure of private property held under statutory rights as in the case of mining claims. Nor can the selector hide behind the claim that just because the Land Office records show no such claim, the lands are, therefore, vacant and open to settlement.

One who has made a mining location upon the public land in the manner provided for in the statute and in conformity with the local laws and regulations of miners, has a qualified title to the land which may be bought and sold as other property, Silver Bow M. & M. Co. *v.* Clark, 5 Mont., 378. He is not bound to apply for a patent or to pay for the use of the land. Chapman *v.* Toy Long, 4 Sawyer, 28. Therefore, he is not required to give the Land Department notice of his claim in order to give him a vested right to the land. By his location he has segregated the land from the public domain, St. Louis M. Co., 171 U. S., 650, and has the exclusive right of possession and enjoyment of all the surface included within the

lines of his claim, Belk *v.* Meagher, 104 U. S., 279; Gwillim *v.* Donnellan, 115 U. S., 45; Noyes *v.* Mantle, 127 U. S., 348; Sullivan *v.* Iron Silver M. Co., 143 U. S., 431. Whether that claim is valid or whether the land is vacant and open to settlement is not left to the agricultural claimant to decide, merely by his affidavit, especially where he
105 fails to state the facts or thinly disguises them. Congress has entrusted the Land Department with the determination of whether a mining claim contains valuable minerals, Steel *v.* St. Louis M. Co. 106 U. S. 447, Coleman *vs.* McKenzie, (28 L. D. 348). If the agricultural claimant stated the facts, the local officers should have required him to give the mineral claimant notice of the proposed filing. He is on the land in personal occupancy and under color of right and should be allowed an opportunity to show that the land possessed minerals in paying quantities, in which event his rights would relate back to the date of location. See Lindley on Mines, par. 219, Belk *v.* Meagher, 3 Mont. 65. I am not unmindful of the recent ruling that the Land Department has no control over a mineral claimant until he seeks patent, but such ruling (Barklage *et al. v.* Russell *et al.*, 29 L. D. 401) only holds that questions arising between rival mineral claimants as to the right of possession are solely matters for the courts and did not hold that the department, at any time prior to patent, is ousted of its jurisdiction to determine under what provision of the public land law patent shall issue.

From the foregoing, I would deduce the following: That at the date of these selections, the lands included therein were covered by mining claims and therefore not vacant; that they were known to contain mineral and, therefore, were not open to settlement; that the fact that these conditions were not of record in the Land Office did not affect the mineral locator's rights, and that the failure of the agricultural claimant, to state the facts was a fraud on the Government and the mineral claimant, as the selectors are charged with notice of mining locations. If any further evidence were
106 needed in support of the above conclusions, it is to be found in the special agent's report, made with reference to these particular selections, nor can there be any question of the authority of this office to consider such report, in connection with the record in this case, the Government always being an interested party in the determination of the character of the public land and this office being charged with the proper disposition of such lands.

The special agent's report is strong and convincing, is supported by affidavits and concludes with the following recommendation:

I recommend that this application be not only disallowed, but that the matter be placed before the proper authority, and that criminal proceedings be brought against the party who had the effrontery to take the non-mineral oath that was a part of the application. It is a monstrous fraud, and one that the department should prosecute to the bitter end. This 160 acres of land is worth $500,000 for the mineral (oil) there is beneath the surface, for agricultural purposes not 5 cts. an acre.

The instructions governing the manner of proceeding upon special

agents' reports (approved August 18, 1899, 29 L. D. 141) provide as follows:

1. Hereafter, when there is filed in this office a report of a special agent alleging that a certain entry, filing, location, or claim for a specified tract of public lands, is fraudulent, or illegal, or that the claimant has failed to comply with the requirements of law, and the facts presented are sufficient, if true, to warrant the cancellation of the entry or claim, the proper local officers will be promptly advised thereof, and will be directed to serve notice upon the entryman or claimant in the following manner:

2. The notice must specifically define the charges contained in the special agents' report adverse to the entry, filing, location, or
107 claim; and the entryman or claimant shall be advised that he will be allowed thirty days within which to apply for a hearing, and that a failure to apply for such hearing within the prescribed time will be taken as an admission of the truth of the charges.

The further consideration of this case must therefore proceed upon the lines laid down in said instructions with personal service of notice or by publication where personal service cannot be had. If the agricultural claimant applies for a hearing, you will proceed under the instructions and forward the application to this office and in default of such application, after due notice you will report the facts to this office.

Very respectfully, BINGER HERMANN,
Commissioner.

108 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *January* 16, 1901.

KERN OIL COMPANY
vs.
C. W. CLARKE.

Forest lieu selections 1772–1774; decision, December 18, 1900.

Register and receiver, Visalia, California.

SIRS: Referring to my decision of December 18, 1900, in the above-entitled case, the same should read "T. 29 S." instead of "T. 29 N.," and "Kern River Oil Company," should read "Kern Oil Company." This is done to correct apparent discrepancies.

Advise parties in interest.

Very respectfully, BINGER HERMANN,
Commissioner.

109 EXHIBIT S.

Filed April 16, 1902.

Before the Department of the Interior.

KERN OIL COMPANY
vs.
C. W. CLARKE. } 45343.

Involving Visalia, California, forest lieu selections 1772 and 1774.

Appeal & Specifications of Error.

Comes now C. W. Clarke, by his attorney Horace F. Clarke, and appeals to the honorable Secretary of the Interior from the decision of the Commissioner of the General Land Office, dated December 18, 1900, and for cause specifies the following reasons and grounds of error, to wit:

The Commissioner has grossly abused the ordinary power and discretion vested in him in ordering a hearing to determine the character of land, in these particulars.

1. That the decision in question rests upon questions of law, each and all of which have been therein erroneously and contrary to the decisions of this department upon the subject.

2. In giving weight to allegations which do not show at the date of the forest lieu selections herein a valid discovery of mineral had been made upon the premises covered thereby.

3. In ordering a hearing to determine the character of land embraced in forest lieu selections, on account of, and for the purpose of taking into consideration, oil discoveries made thereon, after
110 such selections were made, where such selections were made in lieu of patented lands relinquished to the Government.

In the decision complained of, the Commissioner has erred as follows:

1. In assuming that a discovery of mineral or oil upon land returned as agricultural in character, though made subsequent to a forest lieu selection thereof, operates retroactively so as to constitute such land minerals in character in contemplation of law at the date of such selection.

2. In assuming and holding that the act of June 4, 1897, requires selections thereunder to be accompanied by non-mineral affidavits.

3. In holding that when these selections were made, the rules and regulations of the Land Department required *by* non-mineral or other affidavit to accompany selections under the act of June 4, 1897.

4. In holding that the clause stricken out of the non-mineral affidavit used in these cases, namely, "that no portion of said land is claimed for mining purposes under the local rules or customs of miners or otherwise," is material, and that the striking out of such a clause was an evasion of the law.

5. In holding that the purpose, motive or intent of a person making selection of lands under the act of June 4, 1897, is material and constitutes an element in his right of selection.

6. In holding that it was evasive for the maker of the nonmineral affidavits in these cases to insert therein the language
111 "so far as deponent knows," in referring to the purpose of the selector.

7. In holding that it was evasive for the maker of such affidavits to state that the same were based upon the evidences found upon the surface of the ground.

8. In holding that a forest lieu selection in exchange for patented lands relinquished to the Government does not constitute a final entry, and in holding that such a selection was only of the same dignity, force and effect as an original application for a homestead.

9. In holding that a selection under the act of June 4, 1897, does not amount to a final entry or its equivalent until the approval thereof by the Commissioner of the General Land Office.

10. In holding that the publication of notice to adverse claimants prescribed by the rules and regulations of the Land Department, and the proof of such publication and the approval thereof by the Commissioner, are conditions precedent to any rights attaching in favor of the selector, instead of mere conditions subsequent prescribed by the Land Department to enable it to determine as to whether or not the requirements of the law have been met.

11. In holding that the McDonald and Clarke cases, 30 L. D. 124 and 145, have no application to a case where the character of land involved is concerned.

12. In assuming that these selections operated to either "forcibly, surreptitiously, clandestinely or otherwise fraudulently" intrude upon or oust the mineral claimant while asleep in his cabin or temporarily absent from his claim.

112 13. In holding mere surface indications of mineral in the absence of the actual discovery of mineral, to be sufficient to defeat selections under the act of June 4, 1897.

14. In assuming that the mineral land laws are the laws provided for the acquisition of lands which contain no mineral discoveries, as was the case with these lands when they were attempted to be located by mineral claimants.

15. In holding that the good faith of the mineral claimants, in these cases, is apparent and conclusive, and in holding that the contrary was true as to the selection of Clarke.

16. In holding that the selector, Clarke, was evasively seeking to acquire mineral land under agricultural laws, and in holding that these were mineral and not agricultural lands when selected by Clarke.

17. In not holding that the character of these lands was fixed and determined by the known conditions at the date these selections were made, and in not holding that such character thus fixed was agricultural and not mineral.

18. In holding that the selector Clarke is seeking without cost or

labor to reap where others have sown, whereas, it is shown that for every acre of land selected by Clarke, the Government had received from the selector an acre in exchange, and that the mineral claimants had paid nothing and discovered nothing, when such selections were made, and that their investment of money has all been made since such selections were made, with full knowledge of the selector's rights.

113 19. In holding that the selector's motive was material, or that such notice, in these cases, operated to violate the rights of mineral claimants when they had no rights.

20. In assuming that by these selections the usurpation of property rights, or the seizure of private property held under statutory rights is contemplated or sought.

21. In holding that the mere existence of mining claims upon which no mineral discoveries have been made, operates to render lands (though returned as agricultural) not vacant, and hence not subject to selection under the act of June 4, 1897.

22. In holding that the lands in controversy here were known to contain mineral when selected by Clarke, and therefore that the same were not open to settlement or subject to selection by Clarke.

23. In holding that the selector, or his agent who made the non-mineral affidavit, failed to state the facts, and in holding that such failure to state the facts, was a fraud either upon the Government or upon the mineral claimant.

24. In considering in this case the special agent's report, not made public, and to which the selector has had no access.

25. And in giving weight to a report of a special agent, the quoted language of which report shows such special agent to be inimical to this claimant and prejudiced in favor of the mineral protestants.

114 26. In quoting from and giving to the public a defamatory recommendation from the special agent's report, after having reached his conclusions, and made his findings based upon other facts.

27. In publicly quoting a defamatory recommendation of a secret and undisclosed agent, which recommendation is not supported by any facts from such report, set forth in the opinion in question.

28. In holding that the mere occupancy and improvements of a mineral claimant, in the absence of an actual discovery of mineral or oil, prevents land—returned as agricultural—being subject to selection under the act of June 4, 1897.

29. In holding that subsequent mineral developement and subsequent mineral or oil discoveries can impair or defeat prior forest lieu selection properly made.

30. In not holding that the selector, Clarke's, rights in the premises were fixed by the known character and condition of the selected lands at the date they were selected.

31. In holding that lands selected in lieu of patented forest reserve lands relinquished to the Government are open to exploration under the mining laws after the selector, by such relinquishment and

selection, has on his part, fully executed the contract of exchange of lands with the Government.

32. In holding that the mineral claimants are seeking in a proper manner to acquire title to this land.

33. In holding every one of the legal subdivisions involved to be mineral in character upon insufficient allegations and in the
115 face of the selector's claim to the contrary, and in failing to consider that portion of the decision in Ferrell *v.* Hoge (29 L. D., 12) wherein it was held that a single discovery of mineral would support a placer location of 160 acres *only* in the absence of a claim or evidence that any one of the legal subdivisions was not mineral in character.

34. In pronouncing evidence in behalf of the selector false.

35. In deciding that these mineral claimants are holding under a statutory *right* as distinguished from a *claim* under the statute, which appellant insists is unfounded.

36. In finding as a fact that the mineral claimants have locations made "in the manner provided for in the statute and in comformity with the local laws and regulations of miners," in the absence of any proper allegations or proof of that fact.

37. In holding that the forest lieu claimant has failed "to state the facts or thinly disguises them."

38. In assuming legislative functions and declaring that the selector should give specific notice of his selection to any squatter or other person upon the land, no matter how unfounded or preposterous may be the claim of such person.

39. In holding that regardless of the validity or invalidity of a location, the rights of a locator relate to the date of attempted location.

40. In holding that a mining claim or location, regardless
116 of its validity or invalidity, prevents land covered thereby from being subject to forest lieu selection.

41. In prejudging this case and rendering this decision in favor of protestants before any hearing, thereby improperly influencing the register and receiver, and advising them what the facts are and their legal effect in advance of a hearing.

42. In holding and deciding that the selection of the land in controversy, under the law of June 4, 1897, did not then and there vest the right thereto in the selector who had complied with such law in relinquishing his patented forest reserve land to the Government and in making his selection.

43. In holding and deciding in this case that an alleged mining location of land under the placer mining laws, in advance of discovery of oil thereon, operated in law to withdraw said land from selection under the act of June 4, 1897.

44. In holding and deciding that a discovery of oil in the selected land, after selection thereof and before approval by the Commissioner, defeated such selection.

45. In holding and deciding that under the law of June 4, 1897, an approval of selection by the Commissioner of the General Land Office was necessary to give validity thereto.

46. In holding and deciding that the selection of said land, in compliance with the law of June 4, 1897, did not withdraw said land from exploration for minerals under the mineral laws.

47. In holding that the protestants showed any discovery of mineral or oil which established the land in question to
117 be more valuable for mineral or oil than agricultural purposes, when the same was selected by Clarke.

48. In deciding for protestant- and in not deciding for selector.

49. In not dismissing said protests on motion of the selector.

50. In not ordering the patents to said selected lands to issue in favor of selector.

Respectfully submitted.

HORACE F. CLARKE,
Attorney for C. W. Clarke.

EXHIBIT "T."

Filed April 16, 1902.

The cases of Sierra Lumber Co. (22 L. D., 690), and David Walters (24 L. D., 58), cited in support of the appeal, are not controlling. It may be, as contended, that these cases are like the present one, but they are not so stated, and the rulings therein made must be confined to the facts stated. It is said in these cases that the entryman at the time of entry paid all the fees and commissions required by law. This is not true of the present case.

The decision appealed from is affirmed.

LIEU SELECTIONS UNDER THE ACT OF JUNE 4, 1897.

KERN OIL COMPANY ET AL. *v.* CLARKE.

A person making selection under the act of June 4, 1897, who has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, acquires a vested interest therein and is to be regarded as the equitable owner thereof.

The right to a patent under said act, once vested, is, for most purposes, the equivalent of a patent issued; and when in fact issued, the patent relates back to the time when the right to it became fixed, and takes effect as of that date.

Questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtaining title have been complied with by the selector, and no change in such conditions, subsequently occurring, can affect his rights.

The land department has the jurisdiction and power, either of its own motion or at the instance of third parties, at any time before patent is issued, and after appropriate notice, to institute and carry on such proceedings as may be necessary to enable it to determine whether the selected lands were of the requisite class and character, and whether the selection was in other respects regular and in conformity with the requirements of the act. But the determination must relate to the time when the selector has done all that is required of him in order to perfect his right to a patent.

The essential requirements to be complied with by a person seeking title to a tract of land in exchange for land covered by a patent in a forest reservation, are:

(1) That he must relinquish to the government the tract in the forest reservation, and submit satisfactory evidence respecting the title thereto;

(2) That he must make selection of the tract desired in exchange for the tract relinquished, and accompany the selection by proof showing the selected land to be of the condition and character subject to selection.

In so far as existing conditions appear from the land office records, no showing by the selector need be made, because the officers of the government must take notice of the public records; but as to conditions the existence or non-existence of which can not be determined by anything appearing upon these records, the required evidence must be furnished by the selector.

See departmental decision, of even date herewith, in the case of the Gray Eagle Oil Company *v.* Clarke, 30 L. D., 570.

Secretary Hitchcock to the Commissioner of the General Land Office.
(W. V. D.) *April 25, 1901.* (A. B. P.)

The act of Congress approved June 4, 1897 (30 Stat., 11, 34–6), among other things, contains various provisions with respect to forest

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reservations, established and to be established under the act of March 3, 1891 (26 Stat., 1095, 1103), one of which is the following:

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

By a subsequent act, approved June 6, 1900 (31 Stat., 588, 614), it was declared:

That all selections of land made in lieu of a tract covered by an unperfected bona fide claim, or by a patent, included within a public forest reservation, as provided in the act of June fourth, eighteen hundred and ninety-seven, ... shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry not exceeding in area the tract covered by such claim or patent: *Provided*, That nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof.

December 14, 1899, C. W. Clarke filed in the local office at Visalia, California, two separate selections of lands, in lieu of an equal quantity of lands of which he had become the owner, covered by a patent from the United States and situate within the limits of a public forest reservation. As these selections were filed before October 1, 1900, they are to be governed by the original act, and a consideration of the amendatory act is not here necessary. One of the selections embraces the N. ½ of the SE. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. M., and the other the S. ½ of the NE. ¼ of said section 4. That the lands within the forest reservation, in lieu of which the selections were made, were seasonably and properly relinquished to the United States, and that the relinquishment was accompanied by a showing of full and unincumbered title in the selector to the relinquished lands, are matters which are not questioned by protestants or your office. Each selection was by an application made out upon a printed form in which no changes were made other than the filling in of blanks. The form of application so used is as follows:

Act of June 4, 1897 (30 Stat., 36).

SELECTION IN LIEU OF LAND IN THE .... FOREST RESERVE, ... LAND DISTRICT, STATE OF ..... CREATED ...., ...

To the REGISTER AND RECEIVER,
United States Land Office,

....., ...

GENTLEMEN: In accordance with the provisions of an act of Congress approved June 4, 1897, entitled "An act making appropriations for sundry civil expenses of

the Government for the fiscal year ending June 30, 1898, and for other purposes," I, ... of ..... County, State of ....., do hereby select and locate the following described tract of ..... land, to wit: .....

.....

.....

In lieu of

.....

.....

The said last mentioned tract is included within the limits of the ..... Forest Reservation in ....., and being the owner, and desiring to select other land in lieu of said tract, I made and executed a deed of reconveyance thereof to the United States on the .... day of ....., 189., as provided by the said Act of June 4, 1897, which said deed has been recorded in the proper county. I therefore ask that a United States patent issue to me for the land hereby selected.

Witness my hand this .... day of ....., 18...

....

Post Office Address ....

The application or selection was accompanied in each instance by an affidavit also made out upon a printed form. Portions of the printed matter in this form were erased and interpolations were made in other portions thereof before the affidavit was verified or filed. The form of affidavit so used, with the erasures shown in small capitals, and the interpolations shown in italics, is as follows:

(Act June 4, 1897.)

AFFIDAVIT OF NON-MINERAL CHARACTER AND NON-OCCUPANCY.

U. S. LAND OFFICE,

.....

.... being duly sworn according to law deposes and says: that he is over the age of 21 years, a citizen of the United States and of the State of ..... and a ..... by ..... and is well acquainted with the character of the following described land and with each and every legal subdivision thereof, to wit:

.....

.....

THAT THERE IS NO OCCUPATION OF SAID LAND ADVERSE TO THE SELECTION THEREOF UNDER THE ACT OF JUNE 4, 1897, BY .... That the tract applied for is agricultural in character and contains no known deposits of coal, or other minerals, and is not subject to entry under the coal or mineral land laws of the United States; *this affidavit is made upon the evidence found upon the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground.*

That he has frequently passed over the same and his personal knowledge of said land is such as to enable him to testify understandingly in regard thereto; that there is not to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposits; THAT NO PORTION OF SAID LAND IS CLAIMED FOR MINING PURPOSES UNDER THE LOCAL CUSTOMS OR RULES OF MINERS OR OTHERWISE; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land and that the application therefor is not made for the purpose of fraudulently obtaining

title to mineral land, but with the object of securing said land for agricultural purposes, *so far as deponent knows;* and that the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof, and that his post-office address is .....

....

February 6, 1900, the Kern Oil Company filed a protest against both selections. The allegations of the protest and of the affidavits accompanying the same, are, in substance and effect, as follows: That the Kern Oil Company and its predecessors in interest were, at the date of the filing of said selections, and have been continuously since that time, in the possession and occupancy of the lands covered thereby, claiming, working, and developing the same under certain placer mining locations, made June 11, 1899, known as the "Fossil" and "June Bug" claims; that said lands are of great value for the deposits of petroleum oil contained therein, were known to be valuable for such deposits when the said selections were filed, and are worthless for agricultural purposes; that the lands lie in one of the greatest mineral oil belts in the State of California, and in the immediate vicinity of other valuable oil mining claims; that the oil-bearing formation underlying the land is flat or horizontal, known as a blanket formation; that Clarke well knew the mineral character of the lands when he selected the same; and that the filing of said selections was an endeavor on his part to fraudulently obtain title to mineral lands under the act of June 4, 1897.

February 12, 1900, J. F. Elwood *et al.* filed separate protests against said selections. Possession and occupancy of the lands for oil mining purposes and their known mineral character, at the date when the selections were filed, as well as the worthlessness of the lands for agricultural purposes, are alleged in these protests substantially as in the former protest, and it is further stated that the lands are worth $250 cash per acre on account of the mineral oils contained in them.

The protests and accompanying affidavits were, in due course of business, forwarded to your office, accompanied by the recommendation of the local officers that a hearing be had thereon.

Additional affidavits were subsequently filed on behalf of the protestants. These relate chiefly to work done on the lands by the mineral claimants after the protests were filed, in the boring of wells and the further development of the mining claims, and are generally to the effect that large quantities of oil have been and are being taken from these claims, and that the lands covered thereby, as well as those in the vicinity thereof, have become and are immensely valuable on account of their oil-bearing character.

By decision of December 18, 1900, your office held that the allegations made in the protests against the selections should be investigated,

and gave directions for a hearing. The principles announced in the decision as a guide for the conduct of the hearing, briefly stated, are:

(1) That rights predicated upon the act of June 4, 1897, do not attach to lands selected thereunder until the selector has done all that he is by the law required to do, and the selection has been approved by the land department;

(2) That in the present case the selections have not yet been approved by the land department, and consequently the lands embraced therein have remained open to occupancy or exploration for minerals, and evidence with respect to their present condition, as to whether vacant or occupied, and with respect to their present character, as to whether known to contain valuable mineral deposits or not, is admissible upon an investigation had for the purpose of determining whether or not the selections shall be approved.

Clarke has appealed to the Department. His principal contentions, substantially stated, are:

(1) That the equitable title to lands selected under the act of June 4, 1897, in lieu of patented lands relinquished, vests at the date of selection, and can not be impaired by subsequent mineral discoveries in the lands;

(2) That lands are vacant and open to settlement, and hence subject to selection under said act, when no other claim thereto is disclosed by the land office records, unless, at the date of selection, they are known to contain minerals to such an extent as to make them more valuable on account thereof than for agricultural purposes;

(3) That the protests do not show the selected lands to have been covered by any other claim of record, or to have been known to be more valuable for mineral than for agricultural purposes, at the date when the selections were filed, and are therefore insufficient to justify a hearing.

The opposing contentions of the protestants, appellees, substantially stated, are:

(1) That all lands selected under said act in lieu of relinquished forest reserve lands covered by patent remain open to exploration under the mining laws until the approval of the selection by the land department, and if at any time after the selection and before its approval, the selected land is discovered to contain valuable mineral deposits, its mineral character will be thereby established and the selection defeated.

(2) That lands are vacant and open to settlement, and therefore subject to selection under said act, only when they are unoccupied by others, are free from other claim of record, and are non-mineral in character;

(3) That the protests in this case show, *prima facie*, that the selected lands were occupied by others claiming possessory title thereto under

mining locations duly made and legally asserted, at the date when the selections were filed; that the lands were then known to be mineral in character; and that petroleum oil in large quantities and of great value has been since developed thereon.

It is admitted by the appellant that by reason of mining developments on the lands since the selections were filed, they are now known to be very valuable for the deposits of mineral oils contained in them, and that the protestants, appellees, are in the possession thereof and are daily extracting large quantities of oil therefrom.

Extensive and elaborate printed briefs on behalf of the contending parties have been filed, and the case has been argued orally with great ability and earnestness by counsel on both sides.

The first general legislation on the subject of forest reservations is found in section 24 of the act of March 3, 1891 (26 Stat., 1095, 1103), which reads as follows:

> That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

By virtue of the authority thus conferred numerous forest reservations have been established in various States and Territories. As was said in the case of F. A. Hyde *et al.* (28 L. D., 284, 286):

> By the establishment of these reservations many claimants and owners of lands within the reservation boundaries were placed in a state of greater or less isolation from market and business centers, and from church, school, and social advantages, and the value of their property for residence and other purposes was thereby impaired. The withdrawal from settlement and other disposition of the surrounding public lands precluded such persons from obtaining the advantages consequent upon the continuing and increasing settlement which was anticipated when their claims were initiated or their title acquired.

It was with the view to relieving the situation thus described and to promoting the objects for which the reservations were established, that the act of June 4, 1897, was passed. Those objects were, as declared in that act, to improve and protect the forests in the reservations for the purpose of securing conditions favorable to a continuous water flow and to a permanent supply of timber for the use and necessities of the citizens of the United States. Manifestly the government would be greatly assisted in accomplishing the objects desired by securing exclusive ownership and control of the lands within the reservations. The act in question contains an offer by the government to exchange any of its lands that are vacant and open to settlement for a like quantity of lands, within a forest reservation, for which a patent has been issued, or to which an unperfected *bona fide* claim has been acquired. If he desires to accept the offered exchange, the owner or claimant of the tract in the forest reservation can relinquish the same to the govern-

ment and select a tract of public land of like quantity in lieu of the tract relinquished. He is to make the selection, and in doing so he is confined to lands which are both vacant and open to settlement. They must not be occupied by others, nor reserved from settlement on account of their known mineral character or otherwise. With these exceptions the field for selection, except when otherwise specially provided, is co-extensive with the limits of the public domain. Further restrictions are imposed by the amendment of June 6, 1900, but they are not applicable to this case.

When do rights under the selection become vested? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the government holds the legal title in trust for him; (2) that the right to a patent once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring, can impair or in any manner affect his rights.

The authorities in support of these propositions are numerous. It will be sufficient to refer to a few of them.

In Carroll *v.* Safford (3 How., 441, 461) it was said:

> Now, lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. . . . . When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser; and a second purchaser would take the land charged with the trust.

In French *v.* Spencer (21 How., 228) it appeared that a military land warrant had been located on a tract of land, which thereafter, but before the issue of the patent, had been sold by the locator. The act under which the land warrant was issued provided that no claim for military bounty should be assignable or transferable until after the patent had been issued, and that all sales, mortgages, or contracts made prior thereto should be void. It was held that rights under the land warrant vested upon location, that the patent when issued related back to the time of the location, and that the conveyance intermediate the location and patent was valid and carried the title.

In Witherspoon *v.* Duncan (4 Wall., 210, 218) the court held as follows:

In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer and is a void act. . . . . The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the lands cease to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser who has the equitable title.

In Stark *v.* Starrs *et al.* (6 Wall., 402) the plaintiffs below, Starrs *et al.*, claimed title under a patent based upon an act of Congress of May 23, 1844 (5 Stat., 657), known as the town site act, and Stark, the defendant below, claimed under a patent based upon the act of September 27, 1850 (9 Stat., 496), known as the Oregon donation act. The town site patent was issued December 7, 1860, and the patent under the donation act was issued December 8, 1860. The court, in determining the controversy thus presented, said:

We are clear that the town site act of 1844 was not extended to Oregon until the 17th of July, 1854; and even then that it only operated to exclude lands occupied as town sites, or settled upon for purposes of business or trade, from a donation claim, which had not been previously surveyed. Before the passage of this act the claim of the defendant, Stark, had been surveyed, and the required proof of his settlement and continued occupation and residence made, and such steps had been taken as to perfect his right to a patent. The lands embraced by his claim had then ceased to be the subject of purchase from the United States by any person, natural or artificial. The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants.

In Barney *v.* Dolph (97 U. S., 652, 656) it was said:

When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued. We so decided in Stark *v.* Starrs, 6 Wall., 402. The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty. An authorized sale by a settler, therefore, after his right to a patent had been fully secured, was, as to the government, a transfer of the ownership of the land.

In Wirth *v.* Branson (98 U. S., 118, 121) it was held:

The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside.

This was laid down as a principle in the case of Lytle *et al. v.* The State of Arkansas *et al.* (9 How. 314), and has ever since been adhered to.

In Simmons *v.* Wagner (101 U. S., 260, 261) the court said:

It is well settled that when lands have once been sold by the United States and the purchase-money paid, the lands sold are segregated from the public domain, and are no longer subject to entry. A subsequent sale and grant of the same lands to another person would be absolutely null and void so long as the first sale continued in force. Wirth *v.* Branson, 98 id., 118; Frisbie *v.* Whitney, 9 Wall., 187; Lytle *v.* The State of Arkansas, 9 How., 314. Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty.

The case of Benson Mining and Smelting Company *v.* Alta Mining and Smelting Company (145 U. S., 428) involved a controversy which arose under the provisions of the mining laws. An application for patent was filed under section 2325 of the Revised Statutes, notice of the application was duly posted and published, and in the absence of any adverse claim filed prior to the expiration of the period of publication, the applicant paid the purchase price for the land and did all which the law required him to do in order to secure a patent for his claim. It was sought to defeat his right to a patent on the ground that he had failed to continue the expenditure of $100 in labor and improvements upon his claim each year after the completion of his patent proceedings, in accordance with the requirement of section 2324 of the Revised Statutes, that—

On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year.

In denying this contention, the court said:

It is a general rule, in respect to the sales of real estate, that when the purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government; and the rule has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership.

Then, after considering a number of authorities on the subject, most of which have been herein referred to, it was further said:

There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists, the full equitable title has passed to the purchaser with all the benefits, immunities and burdens of ownership, and that no third party can acquire from the government an interest as against him.

In Deffeback *v.* Hawke (115 U. S., 392, 404), after referring to and discussing certain provisions of the statutes relating to the disposal of lands valuable for minerals, the court said:

It is plain, from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of sale to be valuable for its minerals of

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gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws or the town site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas. We say "land *known* at the time to be *valuable* for its minerals," as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term "mineral" in the sense of the statute is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section and re-enacted one of broader import, it is "*valuable* mineral deposits" which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. It is there enacted that "lands *valuable* for minerals" shall be reserved from sale, except as otherwise expressly directed, and that "*valuable* mineral deposits" in lands belonging to the United States shall be free and open to exploration and purchase. We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued.

In Colorado Coal and Iron Company *v.* United States (123 U. S., 307, 328) it was said:

A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins and mines, can not affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale.

See also Hedrick *v.* Atchinson, etc., R. R. Co. (167 U. S., 673, 679); Widdicombe *v.* Childers (124 U. S., 400).

To the same general effect have been the decisions of the Land Department. In Harnish *v.* Wallace (13 L. D., 108-9) it was held, with respect to an entry made under the pre-emption law, that—

In order to defeat the entry, on the ground of mineral character of the land, it must be shown that mineral was known to exist at the time of the entry, and a discovery of mineral made, as in this case, more than four years after the allowance of the entry, will not warrant its cancellation.

In Rea *et al.* *v.* Stephenson (15 L. D., 37) it appeared that a claimant under the homestead law had submitted his final proofs, showing compliance with all legal requirements, and had made final entry. It was sought to defeat his entry by showing subsequent discoveries of valuable minerals in the land. In passing upon the case, the Department, after referring to a number of authorities on the subject, held:

From these authorities it is evident that the question of the character of the land must be determined, in the case of a homestead entry, as of the date when the final entry is made, and under the conditions then existing.

In the case of Arthur *v.* Earle (21 L. D., 92–3) the Department said:

It is found by the evidence, so far as the allegation that the tracts in question are more valuable for deposits of coal than for agricultural purposes are concerned, that some deposits of coal of no commercial value were discovered on the land by the protestant in August, 1892, after the date of Earle's final entry and the issuance of final certificate to him; that two or three shafts were sunk on said tract, and that small veins of coal were found, which are not shown to have been of any commercial value.

At any rate, the discovery, having been made after the purchase of said land and the issuance of final certificate to Earle, would not defeat the issuance of patent, even though said land should have been shown to be more valuable for coal than for agricultural purposes, as the conditions existing at the date of final entry determine whether the land should be excluded from homestead entry on account of its alleged mineral character.

In Chormicle *v.* Hiller *et al.* (26 L. D., 9, 14) it was held, with respect to an entry made by the defendant, Hiller, under the timber and stone act of June 3, 1878 (20 Stat., 89), that—

Discoveries made subsequent to Hiller's purchase can not be used to defeat his right to the land. The conditions that pertained at the date of entry control, and not what may have been developed since.

In Reid *et al.* *v.* Lavallee *et al.* (26 L. D., 100, 102) it was said:

The only questions, however, properly before the land department in this proceeding are those which relate to the actual known character of the land in controversy at the date of the cash entry No. 269. If the land was then known to be valuable chiefly for its mineral contents it was not subject to such entry. . . . . If the land was agricultural in character when Lavailee made his cash entry therefor, and if he is shown to have possessed the necessary qualifications, and to have fully complied with the homestead law up to that time, his entry must stand.

See also the cases of Aspen Consolidated Mining Co. *v.* Williams (27 L. D., 1, 14–18), and authorities therein cited, and McCormack *v.* Night Hawk and Nightingale Gold Mining Co. (29 L. D., 373).

These established principles, in the opinion of the Department, are applicable to selections under the act of June 4, 1897. The act clearly contemplates an exchange of equivalents. Such is the unmistakable import of its terms. In the case of the relinquishment of patented lands title is to be given by the government for title received. When an unperfected *bona fide* claim is relinquished, the claimant is to be placed in the same situation with respect to the selected tract that he occupied with respect to the tract relinquished. If a complete title is surrendered, the right to a complete title in return is secured. If only an unperfected claim is surrendered, the same rights are secured with respect to the new claim that were possessed with respect to the claim surrendered.

That the administration of the act in question falls within the jurisdiction of the land department there can be no doubt (Bishop of Nesqually *v.* Gibbon, 158 U. S., 155, 167). Selections under the act are therefore subject to examination by the officers of the land depart-

ment until the issuance of patent. This examination is had for the purpose of ascertaining and declaring whether or not the selector, by compliance with all the necessary requisites, has entitled himself to a patent, and not for the purpose of determining whether or not these officers will consent to the selection. If the examination, whether had at the instance of third parties claiming against the selections, or in *ex parte* proceedings, discloses that the selector has fully complied with all the necessary requisites and has honestly and correctly disclosed the title to the land relinquished and the condition and character of the land selected and that the records of the land department disclose no obstacle to the relinquishment or selection, the duty of the land officers is clear; they must patent the land to the selector and they have no discretion to do otherwise. The rights of the selector, however, attach and take effect at the point of time when he has done all that is incumbent upon him to do in the premises and are not postponed to the time when that fact is ascertained and declared by the land officers.

Selections of lieu lands under this act are essentially different from selections of indemnity lands by railroad land grant companies to supply losses in the place limits of their grants. Most, if not all, of the railroad land grants which contain indemnity provisions require that indemnity lands shall be selected by the Secretary of the Interior, or that the selections shall be made under the direction or subject to the approval of that officer. These railroad indemnity selections have none of the elements of an exchange of land for land. The railroad company surrenders no title and the government receives none. Such are not the provisions and effect of the statute here under consideration. The selection is to be made by the owner or claimant who makes the relinquishment, and the only conditions imposed by the statute are that the tract selected shall be "vacant land open to settlement." The contention that the same principles should govern both classes of selections can not be sustained.

It is further contended that the statutory exception of mineral lands from the operation of the homestead law was vitally changed by the act of March 3, 1891 (26 Stat., 1095). By that act the pre-emption law, which contained a provision excepting from entry or sale thereunder certain classes of lands, including "lands on which are situated any known salines or mines," was repealed. This provision had become, by reference (Sec. 2289, R. S.), a part of the homestead law. The act of 1891 also amended the homestead law by striking out all reference to the pre-emption law, and thus eliminated the provision specifically excepting "lands on which are situated any known salines or mines." The contention is that this change in the statute requires the application of a different rule from that which formerly obtained in the matter of fixing the time with respect to

which the character of lands sought to be acquired under the homestead law, is to be determined; that by analogy the different rule should be applied to selections under the act of June 4, 1897, which are to be made of lands open to settlement, the homestead statute being the chief settlement law; that since the repeal of the pre-emption law and the amendment of the homestead law as stated, the only exception of lands on account of their mineral character from settlement and entry under the latter law is that contained in section 2302 of the Revised Statutes, which declares: "Nor shall any mineral lands be liable to entry and settlement under its provisions;" that the words "mineral lands" are of broader significance than the words "lands on which are situated any known salines or mines," and import the actual, rather than the known, character of lands; and that in view thereof, if lands selected under the act of 1897 are shown, at any time before the selections are approved by the land department, to be mineral in character, it will be thus demonstrated that they were in fact mineral lands when selected, and therefore were not subject to selection, though not known at that time to be valuable for minerals.

The Department is not favorably impressed with this contention. The provision in section 2302 excepting mineral lands from disposal under the homestead law was in force prior to the act of March 3 1891, the same as it has been since. The repeal of the pre-emption law and the amendment of the homestead law by that act, did not give to the words of this exception any different meaning or force than they had before. While this section had been a part of the general homestead statute, at least ever since the adoption of the Revised Statutes, the supreme court and the Department, in decisions rendered since that time, have repeatedly and uniformly held, as has already been shown, that to exclude lands from the operation of the homestead law, as well as from the pre-emption and townsite laws, on account of their mineral character, they must be *known* to be valuable for minerals and that if not of *known* mineral character at the time when all necessary requirements have been complied with by the person seeking title under the homestead or other law no subsequent discovery of mineral therein will affect or impair his right or title. These repeated and uniform rulings respecting the operative force of the section in question, must be accepted as a construction thereof contrary to the contention of appellees.

Barden *v.* Northern Pacific Railroad Company (154 U. S., 288), cited and relied on by the appellees, was a very different case from the one here under consideration. That case involved the construction of a grant, in the nature of a donation, of a large amount of lands to a railroad company. "All mineral lands," excepting those containing coal and iron, were expressly excluded from the grant, and a like quantity of non-mineral lands was given in lieu thereof. By a joint

resolution subsequently passed by Congress in relation to that and other similar grants, it was declared that such grants should not be "construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States." In construing the grant, considering the joint resolution as a part of it; considering also the nature and character of the grant, its great magnitude, the circumstances under which it was made, the fact that other lands were given in like quantity in lieu of mineral lands in the place limits; considering the policy of Congress in making its numerous grants in aid of railroads, which had uniformly been to expressly exclude all mineral lands from them, except coal and iron; and considering the previously established rules governing the interpretation of such grants, the court held that the question as to the mineral or non-mineral character of the lands was an open one up to the time of issuing the patent. Manifestly, the principles announced in that case were intended to be controlling only in the administration of railroad land grants, and other land grants of like nature, which are to be strictly construed against the grantee and in favor of the government. In the course of its opinion the court referred with approval to the case of Leavenworth Railroad Company *v.* United States (92 U. S., 733, 739–40), where it was said:

> The rules which govern in the interpretation of legislative grants are so well settled by this court that they hardly need be reasserted. They apply as well to grants of lands to States, to aid in building railroads, as to grants of special privileges to private corporations. In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object the accomplishment of which it desires to promote, but declines directly to undertake. . . . . This grant . . was made for the purpose of aiding a work of internal improvement, and does not extend beyond the intent it expresses. . . . . This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting them; but, if they admit of different meanings—one of extension, and the other of limitation,—they must be accepted in the sense favorable to the grantor.

In another part of the opinion the court said:

> The grant under consideration is one of a public nature. It covers an immense domain, greater in extent than the area of some of our largest States, and must be strictly construed.

It was not intended by the decision in the Barden case to overrule or in any manner interfere with the principles enunciated in numerous earlier decisions, as we have seen, with respect to purchases and entries made under the laws relating generally to the disposal of the public lands. Those principles still prevail in all their original force and effect, and they have been frequently recognized by the supreme court since the decision in the Barden case. See Hedrick *v.* Atchison, etc., Railroad, *supra*, and Shaw *v.* Kellogg (170 U. S., 312).

Shaw *v.* Kellogg is a case which involved the construction of a statute in many respects similar to the one here under consideration.

By act of June 21, 1860 (12 Stat., 71–2), Congress made provision for the adjustment of a dispute between the claimants under two conflicting Mexican grants to a large body of land in the vicinity of Las Vegas, New Mexico. The claimants under the elder grant had signified their willingness to waive all claim to the land in controversy if permitted to take land elsewhere, and the act gave to them—the heirs of Luis Maria Baca—the right "to select, instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico." The selections were to be made within three years and were to be in square bodies not exceeding five in number. They were made within the time limited. Number 4 of the series authorized was involved in the case referred to. Speaking of the time with respect to which rights under the selection became vested, the court said (pp. 332–3):

> The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say "lands then known to contain mineral," for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, pre-emption or townsite entries, the law excludes mineral lands, but it was never doubted that the title once passed was free from all conditions of subsequent discoveries of mineral.

The two acts, considering, as must be done, that the exception of "mineral lands" from the operation of the homestead law is a part of the act of 1897, are, in effect, the same, with respect to the matter now under consideration. The supreme court held, in the Shaw-Kellogg case, that lands vacant and "not known to contain mineral" at the time of selection, passed under the act of 1860, whether subsequently discovered to be mineral or not. The same rule should be applied to selections under the act of 1897. It would be strange indeed, if by the latter act, Congress intended that one who, accepting the government's offer of exchange, relinquishes a tract to which he has obtained full title in a forest reservation, and in lieu thereof selects a tract of land which at the time is vacant and open to settlement, and does all that is required of him to complete the selection and to perfect the exchange, should thereby acquire only an inchoate right to the selected tract, liable to be defeated by subsequent discoveries of mineral at any time before patent, or before final action upon the selection by the land department. Such a construction would not only tend to defeat the objects for which the act was passed, by discouraging owners of

lands in forest reservations from giving up their titles, but would be against both the letter and spirit of the act. Parties would be slow indeed to relinquish their complete titles if it were once understood that they could obtain only doubtful or contingent rights in return for them. It could not have been the intention of Congress that parties accepting the government's offer of exchange should be embarrassed by any such conditions of doubt and uncertainty.

The Department accordingly holds:

(1) That where a person making selection under the act of June 4, 1897, has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, he acquires a vested interest therein and is to be regarded as the equitable owner thereof.

(2) That the right to a patent under the act, once vested, is, for most purposes, the equivalent of a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed and takes effect as of that date.

(3) That questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtaining title have been complied with by the selector, and no change in such conditions, subsequently occurring, can affect his rights.

These principles are in no sense antagonistic to the established doctrine of the jurisdiction and control of the land department over the disposition of the public lands. Undoubtedly such jurisdiction and control exist until patent has been issued. Knight *v.* United States Land Association (142 U. S., 161); Michigan Land and Lumber Co. *v.* Rust (168 U. S., 589); Brown *v.* Hitchcock (173 U. S., 473); Hawley *v.* Diller (178 U. S., 476). This jurisdiction extends to determining the question, whether or not the equitable title has passed; but it has never been held that where such title has once actually vested the land department has the power to destroy it. As said in Michigan Land and Lumber Co. *v.* Rust, *supra:*

> Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. Strother *v.* Lucas, 12 Pet., 410, 454; Grignon's Lessee *v.* Astor, 2 How., 319; Chouteau *v.* Eckhart, 2 How., 344, 372; Glasgow *v.* Hortiz, 1 Black, 595; Langdeau *v.* Hanes, 21 Wall., 521; Ryan *v.* Carter, 93 U. S., 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, Rev. Stat. 2449; Frasher *v.* O'Connor, 115 U. S., 102; but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent, Bagnell *v.* Broderick, 13 Pet. 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.
>
> . . . . In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed.

See also Cornelius *v.* Kessel (128 U. S., 456); Orchard *v.* Alexander (157 U. S., 372); and Parsons *v.* Venzke (164 U. S., 89). So, too, with respect to selections under the act of 1897. The land department has the jurisdiction and power, at any time before a patent is issued, to institute and carry on, after appropriate notice, such proceedings as may be necessary to enable it to determine whether the selected lands were of the requisite class and character, and whether the selection was in other respects regular and in conformity with the requirements of the act. But the determination, when had, must relate to the time when, if at all, the selector has done all that is required of him in order to perfect his right to a patent.

What are the essential requirements of a statute respecting the selection of the lieu land with which one seeking title thereto must comply? Upon relinquishing to the government the tract in the forest reservation, he must make selection of the tract desired in exchange therefor. The act so expressly declares. But what showing must he make with respect to the selected tract? The statute authorizes selection only of "vacant land open to settlement." To be vacant, the land must not be occupied by others. To be open to settlement, it must not be known to be valuable for minerals, or reserved from settlement for any other reason. In so far as the existing conditions appear from the land office records, that is, whether the selected tract is of lands to which the settlement laws have been extended, and whether the same is free from record appropriation, claim, or reservation, no showing by the selector in respect thereto need be made for the reason that the officers of the government can and must take notice of the public records. But as to conditions the existence or nonexistence of which can not be determined by anything appearing upon the public records and as to which the officers of the government must depend entirely upon outside evidence, that is, whether the selected tract is occupied by others or known to be valuable for minerals, it is manifestly necessary that the required evidence should be furnished by the selector. The officers of the government can not be expected to know whether land selected under the act is vacant and not known to be valuable for minerals, and in these respects subject to selection. Such an expectation would be impossible of realization. For instance, the Visalia land district, in which the lands in controversy are situated, comprises the greater portion of nine counties in California and embraces an area of over seven million acres. Of this area over five hundred thousand acres of unreserved surveyed public land, scattered throughout the district, were undisposed of at the end of the fiscal year during which the selections in question were filed (see annual report of the Commissioner of the General Land Office for the year ended June 30, 1900). In these respects the Visalia district does not greatly differ from many other land districts wherein selections under the act of 1897 have been, or are likely to be, made. Obviously,

therefore, it could not have been contemplated that the local officers of the various land districts should or could, from personal knowledge, determine the physical conditions pertaining to lands selected under said act. The argument is intensified when applied to the Commissioner of the General Land Office and the Secretary of the Interior.

Nor can selections be lawfully accepted until there is a showing that the selected land is vacant and not known to be valuable for minerals. No other lands are subject to selection, and no selection can be regarded as complete until these essential conditions are made to appear. They do not appear from the public surveys. In this case the lands were surveyed in 1854. Whether since that date they have been continuously, or at any time, vacant, or occupied, and whether at any time known to be valuable for minerals, and if so, whether stripped of their minerals and worked out, are matters not shown by the land office records.

The right to a patent is not acquired in any case until the proofs are such that patent could be issued upon them if nothing were shown to the contrary. As long as anything remains undone which it is essential should be done by the selector in order to entitle him to a patent, the right thereto does not vest.

That a non-mineral affidavit should accompany the selection is not seriously questioned by appellant. It is just as essential that it should be accompanied by a vacancy or non-occupancy affidavit. Appellant's contention that the word "vacant," as used in the statute, means public lands which are not shown by the records of the local office or General Land Office to be claimed, appropriated, or reserved, can not be accepted. Portions of the public lands may be occupied, and for that reason be not subject to selection, and yet there be no mention of their occupancy in the records of the land department. It frequently occurs that persons desiring to secure title to lands under the homestead law, settle upon and occupy the same, for months and even years, before placing their claims of record. By the act of May 14, 1880 (21 Stat., 140, Sec. 3), such settlers are given the same time to file their claims and place their entries of record as was originally given to settlers under the pre emption law (Secs. 2264 and 2265, R. S.). But for various causes it frequently occurs that the time is allowed to pass without entry, and the occupancy is continued by the claimants with the hope and expectation of making entry at some future date. And, as was said by the supreme court in Tarpey *v.* Madsen (178 U. S., 215, 221):

> It is a matter of common knowledge that many go on to the public domain, build cabins and establish themselves, temporarily at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and enclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. Their possessory rights are recognized as of value and made the subjects of barter and sale.

It is thus seen that mere occupancy of the public lands, while creating no right as against the government (Canfield *v.* United States, 167 U. S., 518; Frisbie *v.* Whitney, 9 Wall., 187; Yosemite Valley Case, 15 Wall., 77), is recognized as creating valuable possessory rights in the individual occupants as against all other persons. Unquestionably Congress has the power to protect rights of the character indicated, and it was evidently the intention to furnish such protection as against persons making selection under the act in question; otherwise the word "vacant," as used in the act, would be meaningless. Its use was not necessary to except from selection lands claimed, appropriated or reserved as shown by the land office records. The words "open to settlement" fully and more appropriately exclude lands in that condition. They are not open to settlement. In the Shaw-Kellogg case, *supra*, the supreme court, referring to the words "vacant land," as used in the act of June 21, 1860, held, as we have seen, that the grantees under that act "were not at liberty to select lands already occupied by others." The Department knows of no reason why the same ruling should not be applied to the act of 1897.

The statement of appellant that the land department has never required selections under the act in question to be accompanied by a showing that the selected land is vacant or unoccupied, is not correct. As early as April, 1898, a printed form of application was prescribed by your office and sent to the various local land offices for use in making selections under this act. This form is as follows, the non-occupancy clause being italicized:

4–643. Perfected Claims.

SELECTION IN LIEU OF LAND IN ..... FOREST RESERVE.

(Act June 4, 1897.)

To the REGISTER AND RECEIVER,
United States Land Office,

....

GENTLEMEN: I am the owner of the .....
..... Meridian, containing ..... acres; that said land is situate and lying within the boundaries of the ..... Forest Reserve; that I desire to relinquish and reconvey said land unto the United States, and in lieu thereof to select the .....
..... land district, State of ....., and containing ..... acres, under the provisions of the Act of June 4, 1897 (30 Stat., 36).

In compliance with the regulations under said act I have made, executed, and caused to be recorded in the proper county and State, a deed of reconveyance to the United States of the tract first above described and situate within said ..... Forest Reserve, and in relation thereto have caused a proper abstract of title to be made and authenticated, both of which are herewith submitted.

There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from encumbrance of any kind; also that all

taxes thereon, to the present time, have been paid; and *an affidavit showing the lands selected to be non-mineral in character and unoccupied.* I therefore ask that United States patent issue to me for the tract or tracts thus selected.

------ -------

Dated, ------ --, -----

The evidence required to accompany the application or selection is here clearly set forth. The selector is required to submit with his application "an affidavit showing the lands selected to be non-mineral in character and unoccupied."

This form of application (4–643) was specifically approved by the Secretary of the Interior in the regulations of May 9, 1899 (28 L. D., 521, 524), and December 18, 1899 (29 L. D., 391, 394). In this respect these regulations have remained unchanged, and they are alike obligatory upon your office, local land offices, and all owners and claimants of lands within the limits of a forest reserve who seek to exchange the same for other lands under said act.

It only remains to apply the stated p nciples and regulations to the selections here in question. In making these selections the selector used a form of application different from the one prescribed. The printed form of affidavit used by him, however, contained both non-mineral and non-occupancy allegations; but the portions of this form of affidavit whereby it was intended to show "that there is no occupation of said land adverse to the selection thereof under the act of June 4, 1897," and "that no portion of said land is claimed for mining purposes under the local customs and rules of miners or otherwise," were stricken out before the affidavits were verified or filed, and the result is that the selections are not accompanied by any showing whatever respecting the state of vacancy or occupancy of the land at the time of selection. For this reason the affidavits were insufficient and the selections imperfect. The proof presented by the selector did not show that the land was subject to selection, and would not justify the issuance of patent even if no protests had been filed. In this connection, it is worthy of mention that about the time of making the selections here in question, this selector made several other selections, under the act of 1897, of lands in the same general locality, and the examination of the files of your office shows that the non-occupancy clause is employed in the accompanying affidavit in some instances and not in others. While the reason for this difference in the proof presented in support of selections under the same act is not apparent upon the face of the selection papers, they bear unmistakable evidence of the fact that the use and rejection, respectively, of the non-occupancy clause were deliberate and not inadvertent.

In view of the admitted present occupancy and known value of the land for mining purposes, as hereinbefore stated, it is apparent that the required proofs can not now be supplied. The selections are accordingly rejected. The order of your office directing a hearing is hereby vacated.

152 Copy of Exhibit U:

EXHIBIT U.

Filed April 16, 1902.

4–643. Perfected claims.

Selection in Lieu of Land in —— Forest Reserve.

(Act June 4, 1897.)

To the register and receiver, United States land office, ——.

GENTLEMEN: I am the owner of the ——, —— meridian, containing*— acres; that said land is situate and lying within the boundaries of the —— forest reserve; that I desire to relinquish and reconvey said land unto the United States, and in lieu thereof to select the ——, —— land district, State of ——, and containing — acres, under the provisions of the act of June 4, 1897 (30 Stat., 36).

In compliance with the regulations under said act I have made, executed, and caused to be recorded in the proper county and State, a deed of reconveyance to the United States of the tract first above described and situate within said —— forest reserve, and in relation thereto have caused a proper abstract of title to be made and authenticated, both of which are herewith submitted.

There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from encumbrance of any kind; also that all taxes thereon, to the present time, have been paid, and an affidavit showing the lands selected to be non-mineral in character and unoccupied. I therefore ask that a United States patent issue to me for the tract or tracts thus selected.

—— ——.

Dated, —— —, —.

LAND OFFICE AT ——, —— —, 190–.

I, —— ——, register of the land office, do hereby certify that the land above selected, in lieu of the land herein relinquished to the United States, is free from conflict, and that there is no adverse filing, entry, or claim thereto.

—— ——, *Register.*

Selection approved by the Commissioner of the General Land Office, per letter "R" to register and receiver —— —, 190–.

—— ——, *Div.* "*R.*"

[Endorsed:] No. 45,343. At law. Application of —— ——. P. O. address, ——. To select the ——, situated in ——, district —, in lieu of the ——, situated in ——, district ——, under act June 4, 1897 (30 Stat., 36). Selection approved by Commissioner General Land Office —— —, 190–. Approved for patenting —— —, —. —— ——, division "R." Patented —— —, —. Vol. —, page —.

153 EXHIBIT V.

Filed April 16, 1902.

Before the Department of the Interior.

KERN OIL COMPANY ET AL.
vs.
C. W. CLARKE. } 45343.

Involving Visalia, California, forest lieu selections Nos. 1772 and 1774.

Motion for Review.

Comes now C. W. Clarke, by his attorneys, Shirley C. Ward, Jefferson Chandler, Dudley and Michener, M. A. Ballinger, and Horace F. Clarke, and moves the honorable Secretary of the Interior to review and modify his decision of April 25, 1901, and for cause specifies the following errors, to wit:

1. In using the terms "vacant" and "unoccupied" as equivalent or synonymous, showing in such confusion of terms a confusion of ideas, leading to an erroneous conclusion of law upon the facts.

2. In holding that the department had any power to make any regulation whatever requiring a vacancy or other affidavit to be filed as a condition precedent to the selector's rights becoming vested at the time of selection.

3. In holding that the department had any right to make a regulation requiring a vacancy affidavit.

4. In holding that the department did, before the selection in this case, make any regulation requiring a vacancy affidavit, to be filed at time of selection.

154 5. In holding that the word "vacant" in the act in question meant and was synonymous with "unoccupied."

6. In holding that the department had the power to require an affidavit that the land was unoccupied.

7. In holding that the department had, prior to said selection, made a regulation requiring an affidavit that the land was unoccupied, to be filed at the time of the selection.

8. In holding that any affidavit of any kind was necessary under the law, or any regulation made in pursuance thereof, as a condition precedent to the equitable title to the selected land becoming vested in the selector.

9. In holding that the land owned by the Government of the United States, and shown by the report of the surveyor general, to have been vacant and unoccupied, did not remain so, *prima facia*, until the selection, unless the land records of the United States showed some acquisition or occupation under law changing this condition.

10. In holding that any public land which had ever been vacant, did not remain so, *prima facia*, until the same was entered and possession thereof taken by virtue of some law of the United States. All the public domain was once vacant, and once vacant, with title

resting in the United States, it is still vacant, unless that vacancy has been changed by virtue of and under some law of Congress, and that former character is, in the absence of proof to the contrary, legally presumed to exist at this time.

155 11. In holding that the *prima facia* case of vacancy thus established by the report of the surveyor general, was insufficient in the absence of a vacancy affidavit to justify the issuance of a patent in the absence of any protest or claim by any other party.

12. In holding that a *prima facia* case of vacancy must be supported by affidavit of vacancy in order to justify issuance of patent.

13. In holding that any regulation requiring such affidavit was reasonable and justified.

14. In holding that any such regulation did not take from the selector, rights given to him by Congress.

15. In holding that any such regulation did not impose upon the selector, obligations not created by the act of Congress.

16. In holding that any equitable title would vest, if it vested at all, by reason of any affidavit of vacancy, when it fact titles vest, if it vests at all, because of the fact of vacancy at the time of selection.

17. In holding that the *prima facia* vacancy, which is presumed by law, must be supported by proof thereof, before patent could issue, even in the absence of adverse claim.

18. In holding that proof of vacancy must be filed at the time of selection, instead of at the time of a hearing, if proof be necessary at any time.

19. In holding that the last clause but one of the circular of December 18, 1899, required the use of forms 4–643 and 4–634.

156 20. In holding that if said forms were required, that they were legally required.

21. In holding that any regulation made by the department under this law, could in any sense be binding upon the selector.

22. In holding that any regulation made or sought to be made, could in any manner affect the selector, and was for any other purpose than to regulate the acts of the officers and employees of the department.

23. In holding that any regulation could be made by the department that could require any affidavit found in form 4–634.

24. In holding that selector was bound to make any proof of character of land, as a condition precedent to exchange of lands, when in fact the tender of exchange was made by the Government and was simply accepted by the selector. The Government making the offer of its land was bound to know the character thereof, and if, after acceptance, it did not know the same, then it was the duty of the Government, by its officers, to find out, and if its investigation caused it to believe the land not to be of the character named in the offer, then a hearing should be ordered before the register and receiver to determine the question.

25. In holding that the department can require any proof by the selector as to character of land, unless the act of Congress in specific terms so provided.

26. In holding that the selector must file an affidavit of vacancy

at the time of selection, basing that holding on the circular
157 letter of December, 1899.

27. In holding that the lack of satisfactory proof in support of any selection, entry or claim may not be remedied at any time by the filing of such proof, in the absence of any protest based upon the lack of such proof, or in the absence of any legal adverse claim or right predicated upon the lack of such proof.

28. In not holding that the failure of claimant in this case to submit a non-occupancy affidavit may be remedied by filing such affidavit *nunc pro tunc*.

29. In not ordering a hearing to determine the question of occupancy or non-occupancy, if the department is not satisfied with the record showing upon this point.

30. In holding that the department had power to make a regulation requiring a vacancy affidavit, without therein fixing a future date for it to take effect, when theretofore it had never been the custom of the Land Department to require a vacancy affidavit with any applications for, or acquisition of, lands, under the act of June 4, 1897, and when in fact such affidavit was not and had not theretofore been required in or with applications under any law.

31. In holding that the department had the right or power to make a regulation requiring affidavits to be filed at time of selection, when in fact no such right has ever been given to the department by the act of June 4, 1897, or by any other act of Congress.

32. In holding that the circular of December 18, 1899, issued by the Commissioner of the General Land Office and ap-
158 proved by the Secretary of the Interior, was intended by said Commissioner to require, or did in fact require, an affidavit of vacancy, when this is conclusively shown by the records of the General Land Office, wherein is shown the continued, unchanged, and uninterrupted course of the Land Commissioner, in the execution of the act of June 4, 1897, wherein it has been the uniform holding of said Commissioner, that such an affidavit was not required, and wherein it has been the rule of said Commissioner to approve selections under said act, and cause patents to issue where no such affidavit has been filed by the selector.

33. In holding that an affidavit of vacancy is a necessity when the department, by its general circular of July 11, 1899, page one, notified the public that "Any proper information regarding vacant public lands may be obtained by application at any of the land offices."

34. In holding that the Government, having proposed an exchange of property and held out to the selector certain lands represented by it to be of the class it offers, has any right to require the acceptor (selector) to find out and prove to the Government whether or not its own statements and representations are true. If the Government thinks it has made a mistake, it may of course correct it, but not until this mistake is alleged and then after fair trial; especially so when the full purchase price has been required and paid in
159 advance, in good faith and in compliance with the practice of the department in such cases. The Government is estopped

from enforcing an existing rule, even though a legal one, when by its practice it ignores such rule and sets it at naught, continuously. It has no right to make a rule and hold it up to be brought down on "D" to his destruction and ruin, when "D" has done all that "A," "B," and "C" have done, and when he has seen "A," "B" and "C" go unpunished and in fact rewarded for their course and conduct. It may be that it has been the weakness, carelessness, indifference, or incompetence of the subordinate branch of the department, but this cannot relieve the department of its responsibility. There is today a law of this district punishing certain minor offenses by punching holes in the ears, and some localities still have laws punishing a man for kissing his *own* wife in public. These laws have been ignored, and though still on the books, it would cause indignation throughout the entire world were such laws enforced, and yet it would be just as reasonable for a judge to say it is the law and then enforce it, as to hold us to a rule made, not by Congress, but by the department alone, which rule from its first making until now, has been wholly ignored by every officer of the Government. Its disuse has destroyed any life its promulgation could ever have given to it.

DUDLEY & MICHENER,
JEFFERSON CHANDLER,
HORACE F. CLARK,
S. C. WARD,
JNO. M. THURSTON,
M. A. BALLINGER,
Attorneys for Clarke.

160 I, M. A. Ballinger, on my oath say that the foregoing motion is made in good faith and not for the purpose of delay.

M. A. BALLINGER.

Subscribed and sworn to before me this May 25th, 1901.

E. CATESBY ROWZEE,
Notary Public.

161 EXHIBIT W.

Filed April 16, 1902.

45343.

Affidavit of Non-occupancy in Support of Selection Made by C. W. Clarke under Act of June 4, 1897.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

A. Barion being duly sworn according to law, deposes and says: That he is over the age of twenty-one years, a citizen of the United States and of the State of California. That he was upon the 14th day of December, 1899, well acquainted with the character and condition of the following-described land, and with each and every legal subdivision thereof, to wit: the north half (N. ½) of the southeast quarter (S. E. ¼) of section four (4), township twenty-nine (29) south, range twenty-eight (28) east, Mount Diablo base and meridian, in Kern county, California.

That said land was upon such date unoccupied, and that there was not then any occupation thereof adverse to the selection thereof under the act of June 4, 1897, made upon such date by C. W. Clarke. That affiant has frequently passed over said land, and his personal knowledge thereof is such as to enable him to testify understandingly in regard thereto. That the foregoing statements apply to each and every legal subdivision thereof. That affiant's post-office address is 936 Bryant St., San Francisco, Cal.

A. BARION.

162 Subscribed and sworn to before me this 29 day of May, 1901.

THOMAS S. BURNES,

[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

EXHIBIT X.

Filed April 16, 1902.

45343.

Affidavit of Non-occupancy in Support of Selection Made by C. W. Clarke under Act of June 4, 1897.

STATE OF CALIFORNIA, } *ss:*
City and County of San Francisco, }

A. Barion being duly sworn according to law, deposes and says: That he is over the age of twenty-one years, a citizen of the United States and of the State of California. That he was upon the 14th day of December 1899, well acquainted with the character and condition of the following-described land, and with each and every legal subdivision thereof, to wit: the south half (S. ½) of the north-east quarter (N. E. ¼) of section four (4), township twenty-nine (29) south, range twenty-eight (28) east, Mount Diablo base and meridian, in Kern county, California.

That said land was upon such date unoccupied, and that
163 there was not then any occupation thereof adverse to the selection thereof under the act of June 4, 1897, made such date by C. W. Clarke. That affiant has frequently passed over said land, and his personal knowledge thereof is such as to enable him to testify understandingly in regard thereto. That the foregoing statements apply to each and every legal subdivision thereof. That affiant's post-office address is 936 Bryant St., San Francisco, Cal.

A. BARION.

Subscribed and sworn to before me this 29 day of May, 1901.

THOMAS S. BURNES,

[SEAL.] *Notary Public in and for the City and County of San Francisco, State of California.*

EXHIBIT "Y."

Filed April 16, 1902.

The Department is accordingly of the opinion that where deputies are duly empowered by congressional, State, or territorial laws to perform the duties of clerks of courts of record, the affidavits, proofs, and oaths named in the act of March 11, 1902, may be made before such deputies with like effect as though made before their principals.

ALLEN LAUGHLIN.

Motion for review of departmental decision of February 25, 1902, 31 L. D., 256, denied by Secretary Hitchcock April 12, 1902.

LIEU SELECTIONS UNDER THE ACT OF JUNE 4, 1897.

KERN OIL CO. ET AL. *v.* CLARKE (ON REVIEW).

The word "vacant" in the act of June 4, 1897, as in part descriptive of land thereby made subject to selection in lieu of land situated in a public forest reservation and relinquished to the government, is used in its primary or ordinary sense of *unoccupied*, and not in a special, restricted, or technical sense, intended only to describe land "not taken or appropriated of record."

The land department has authority to make such rules and regulations, not inconsistent with law, as may be necessary or appropriate to secure the effective and convenient administration of any law which falls within its jurisdiction.

Wherever, by act of Congress, provision is made for the disposal of portions of the public lands of a designated class and character, selection or entry thereof under such act can not lawfully be permitted until the lands sought to be acquired under said act are shown to be of the class and character subject to disposal thereunder. When the evidence to enable such determination to be made does not appear from the land office records, it must be furnished by those who seek title under the act.

Under proceedings in the land department to acquire title to public land, no rights in the land are to be regarded as having become vested in the party seeking title until he shall have performed all the conditions and fulfilled all the requirements necessary to establish his right to a patent.

The action of the local land officers upon questions of law or fact respecting the disposal of the public lands does not conclude their superior officers or the government. Such action is, in all cases, reviewable by the Commissioner of the General Land Office and by the Secretary of the Interior as the proper administration of the law or the demands of justice may require.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 12, 1902.* (A. B. P.)

This case is again before the Department on C. W. Clarke's motion for review of the decision of April 25, 1901 (30 L. D., 550), wherein certain forest reserve lieu land selections, filed by Clarke December 14, 1899, embracing the N. ½ of the SE. ¼ and the S. ½ of the NE. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. M., Visalia land district, California, were rejected.

The selections were filed under the act of Congress of June 4, 1897 (30 Stat., 11, 36), wherein, among other things, it was provided—

That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

To this provision certain amendments were made by an act approved June 6, 1900 (31 Stat., 588, 614), but the amendments are not applicable to these selections.

In the course of the decision under review, the Department said (pp. 555–6):

The act in question contains an offer by the government to exchange any of its lands that are vacant and open to settlement for a like quantity of lands, within a forest reservation, for which a patent has been issued, or to which an unperfected *bona fide* claim has been acquired. If he desires to accept the offered exchange, the owner or claimant of the tract in the forest reservation can relinquish the same to the government and select a tract of public land of like quantity in lieu of the tract relinquished. He is to make the selection, and in doing so he is confined to lands which are both vacant and open to settlement. They must not be occupied by others, nor reserved from settlement on account of their known mineral character or otherwise. With these exceptions the field for selection, except when otherwise specially provided, is co-extensive with the limits of the public domain. Further restrictions are imposed by the amendment of June 6, 1900, but they are not applicable to this case.

When do rights under the selection become vested? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the government holds the legal title in trust for him; (2) that the right to a patent once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring, can impair or in any manner affect his rights.

In support of the propositions stated a number of authorities were cited and applied, and in view thereof it was held (p. 560):

These established principles, in the opinion of the Department, are applicable to selections under the act of June 4, 1897. The act clearly contemplates an exchange of equivalents. Such is the unmistakable import of its terms. In the case of the relinquishment of patented lands title is to be given by the government for title received. When an unperfected *bona fide* claim is relinquished, the claimant is to be placed in the same situation with respect to the selected tract that he occupied with respect to the tract relinquished. If a complete title is surrendered, the right to a

complete title in return is secured. If only an unperfected claim is surrendered, the same rights are secured with respect to the new claim that were possessed with respect to the claim surrendered.

After having considered and answered certain contentions by those claiming against the selections, the Department finally summed up its conclusions upon the question as to the time and manner of the vesting of rights under selections based upon said act, as follows (p. 565):

(1) That where a person making selection under the act of June 4, 1897, has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, he acquires a vested interest therein and is to be regarded as the equitable owner thereof.

(2) That the right to a patent under the act, once vested, is, for most purposes, the equivalent of a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed and takes effect as of that date.

(3) That questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtaining title have been complied with by the selector, and no change in such conditions, subsequently occurring, can affect his rights.

It was further said and held in said decision:

What are the essential requirements of the statute respecting the selection of the lieu land with which one seeking title thereto must comply? Upon relinquishing to the government the tract in the forest reservation, he must make selection of the tract desired in exchange therefor. The act so expressly declares. But what showing must he make with respect to the selected tract? The statute authorizes selection only of "vacant land open to settlement." To be vacant, the land must not be occupied by others. To be open to settlement, it must not be known to be valuable for minerals, or reserved from settlement for any other reason. In so far as the existing conditions appear from the land office records, that is, whether the selected tract is of lands to which the settlement laws have been extended, and whether the same is free from record appropriation, claim, or reservation, no showing by the selector in respect thereto need be made for the reason that the officers of the government can and must take notice of the public records. But as to conditions the existence or non-existence of which can not be determined by anything appearing upon the public records and as to which the officers of the government must depend entirely upon outside evidence, that is, whether the selected tract is occupied by others or known to be valuable for minerals, it is manifestly necessary that the required evidence should be furnished by the selector. The officers of the government can not be expected to know whether land selected under the act is vacant and not known to be valuable for minerals, and in these respects subject to selection. . . .

Nor can selections be lawfully accepted until there is a showing that the selected land is vacant and not known to be valuable for minerals. No other lands are subject to selection, and no selection can be regarded as complete until these essential conditions are made to appear. They do not appear from the public surveys. In this case the lands were surveyed in 1854. Whether since that date they have been continuously, or at any time, vacant, or occupied, and whether at any time known to be valuable for minerals, and if so, whether stripped of their minerals and worked out, are matters not shown by the land office records.

The right to a patent is not acquired in any case until the proofs are such that patent could be issued upon them if nothing were shown to the contrary. As long as anything remains undone which it is essential should be done by the selector in order to entitle him to a patent, the right thereto does not vest.

That a non-mineral affidavit should accompany the selection is not seriously questioned by appellant. It is just as essential that it should be accompanied by a vacancy or non-occupancy affidavit. Appellant's contention that the word "vacant," as used in the statute, means public lands which are not shown by the records of the local office or General Land Office to be claimed, appropriated, or reserved, can not be accepted. Portions of the public lands may be occupied, and for that reason be not subject to selection, and yet there be no mention of their occupancy in the records of the land department. It frequently occurs that persons desiring to secure title to lands under the homestead law, settle upon and occupy the same, for months and even years, before placing their claims of record. By the act of May 14, 1880 (21 Stat., 140, Sec. 3), such settlers are given the same time to file their claims and place their entries of record as was originally given to settlers under the pre-emption law (Secs. 2264 and 2265, R. S.). But for various causes it frequently occurs that the time is allowed to pass without entry, and the occupancy is continued by the claimants with the hope and expectation of making entry at some future date. And, as was said by the supreme court in Tarpey *v.* Madsen (178 U. S., 215, 221):

"It is a matter of common knowledge that many go on to the public domain, build cabins and establish themselves, temporarily at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and enclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. Their possessory rights are recognized as of value and made the subjects of barter and sale."

It is thus seen that mere occupancy of the public lands, while creating no right as against the government (Camfield *v.* United States, 167 U. S., 518; Frisbie *v.* Whitney, 9 Wall., 187; Yosemite Valley Case, 15 Wall., 77), is recognized as creating valuable possessory rights in the individual occupants as against all other persons. Unquestionably Congress has the power to protect rights of the character indicated, and it was evidently the intention to furnish such protection as against persons making selection under the act in question; otherwise the word "vacant," as used in the act, would be meaningless. Its use was not necessary to except from selection lands claimed, appropriated or reserved as shown by the land office records. The words "open to settlement" fully and more appropriately exclude lands in that condition. They are not open to settlement. In the Shaw-Kellogg case, *supra*, the supreme court, referring to the words "vacant land," as used in the act of June 21, 1860, held, as we have seen, that the grantees under that act "were not at liberty to select lands already occupied by others." The Department knows of no reason why the same ruling should not be applied to the act of 1897.

It was found that the printed form of affidavit used by Clarke in making the selections in question, while in some respects different from the form prescribed by the departmental regulations, contained both non-mineral and non-occupancy averments; that the non-occupancy averments had been stricken out before the affidavits were verified or filed, and the result thereof was that the selections were not accompanied by any showing whatever respecting the state of vacancy or occupancy of the land at the time of selection. For this reason the affidavits were held to be insufficient and the selections to be imperfect.

The existing occupancy and known value of the land for mining purposes having been admitted at the argument and by the record, it

was further held, in view of such admission, that the required proofs could not then be supplied, and the selections were accordingly rejected.

No exception is taken in the motion for review to the holding of the former decision as to the time when the selector's rights become vested, if at all; or as to the time with respect to which, by the conditions then existing, the class and character of the selected land are to be determined; or as to the effect of the vesting of rights under selections and the issuance of patents for the selected land. The errors assigned as to other parts of the decision are, briefly stated, as follows:

1. In defining the words "vacant land," used in the act of June 4, 1897, to mean *unoccupied* land, and in holding that land, to be subject to selection under the act, must not be occupied by others.

2. In holding that proof of the vacancy or non-occupancy of the land at the time of selection must be furnished by the selector, and that such proof can not be furnished, after the selection has been filed, to take effect as of the date of such filing, when in the mean time the selected land has come to be occupied by others who have, by discovery and development work, demonstrated that it is valuable mineral land.

On application by Clarke, oral argument upon the questions presented by the motion for review was granted, and notice thereof given to all parties interested. Counsel on both sides participated in the oral argument, and also filed lengthy and exhaustive printed briefs in support of their respective contentions.

It is a familiar rule of construction that the words of a statute are to be read and understood in their primary or ordinary sense, and according to their usual import and common acceptation, unless to so construe them would be clearly repugnant to the legislative intention, or would lead to manifestly incongruous or absurd results. (Sutherland on Statutory Construction, Sec. 248; Sedgwick on Construction of Statutory and Constitutional Law, pp. 219–20; Potter's Dwarris, p. 203; Black on Interpretation of Laws, pp. 125 *et seq.*)

In its primary or ordinary sense, *vacant* means empty; unfilled, unoccupied; as a *vacant* or empty box; a *vacant* or unfilled office; a *vacant* or unoccupied house or lot.

It is contended, however, that the word *vacant*, as used with respect to the public lands, had, prior to the act of June 4, 1897, by executive, legislative, and judicial construction, acquired a special, restricted, and technical meaning, the equivalent of "not taken or appropriated of record," and was so used in said act, and not in the sense of *unoccupied*, as held in the decision under review.

Counsel have referred to portions of the annual reports of the Commissioner of the General Land Office, to certain regulations and decisions of the land department, and to acts of Congress and judicial decisions, in all of which the word *vacant* was employed prior to the

passage of the act of 1897. These have all been carefully examined. In some of them the word appears to have been used in its primary or ordinary sense. In others it has been used in the special or restricted sense contended for. In still others, it seems to have been used in both the primary and special senses; that is, as intended to embrace lands neither occupied nor appropriated of record. In some it is not clear in what sense the word is used, whether in its primary, special, or double meaning.

It is not true, as contended, that it has been uniformly used by the supreme court in the sense of "not taken or appropriated of record." This is shown by the following cases:

In Atherton *v.* Fowler (96 U. S., 513, 518–9), decided at October term, 1877, the court, speaking of a controversy which arose under the pre-emption law, said:

> Among the things which the law required of a pre-emptor, and the principal things required of him to secure his right, were: 1. To make a settlement on the land in person. 2. To inhabit and improve the same. 3. To erect a dwelling-house thereon. Sect. 2259, Rev. Stat.
>
> At the moment the land on which the hay in this case was cut became liable to pre-emption, the whole of it was, by the various persons claiming under Vallejo, 1, settled on by them in person; 2, inhabited and improved by them; and, 3, it had dwellings erected on it by them.
>
> Unless some reason is shown, not found in this record, these were the persons entitled to make pre-emption, and no one else. But suppose they were not. Does the policy of the pre-emption law authorize a stranger to thrust these men out of their houses, seize their improvements, and settle exactly where they were settled, and by these acts acquire the initiatory right of pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not purpose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling-house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude.

In Hosmer *v.* Wallace (97 U. S., 575, 579–80), decided at October term, 1878, the court said:

> To create a right of pre-emption there must be settlement, inhabitation, and improvement by the pre-emptor, conditions which cannot be met when the land is in the occupation of another. Settlement, inhabitation, and improvement of one piece of land can confer no rights to another adjacent to it, which at the commencement of the settlement is in the possession and use of others, though upon a subsequent survey by the government it prove to be part of the same sectional subdivision. Under the pre-emption laws, as held in Atherton *v.* Fowler (96 U. S., 513), the right to make a settlement is to be exercised on unsettled land; the right to make improvements is to be exercised on unimproved land; and the right to erect a dwelling-house is to be exercised on vacant land; none of these things can be done on land when it is occupied and used by others.

The word *vacant* was clearly used by the court, in these cases, in the sense of *unoccupied* and not in the sense of "not taken or appropriated of record." It has not been shown, and can not be, that, prior to June 4, 1897, the word, as applied to the public lands, had acquired an exclusive, special or restricted, and technical meaning, the equivalent of "not taken or appropriated of record." Under established rules of construction, the word, in the act of 1897, must be given its primary or ordinary meaning, unless the subject matter or language of the act clearly shows that it was intended to be understood as referring only to the status of land as shown by the land office records, or unless to give to it its primary or ordinary meaning would lead to incongruous or absurd results.

There is nothing in the language of the act or in the nature of the subject to which it relates to show that the word "vacant" was used necessarily and exclusively to describe lands "not taken or appropriated of record." On the contrary, as stated in the decision under review, the use of this word was not necessary to except from selection lands claimed, appropriated, or reserved as shown by the land office records. The words "open to settlement" fully and more appropriately exclude lands in that condition. Nor can there be any reasonable objection to the construction of the word in its primary or ordinary sense of unoccupied, on the ground that such construction might lead to incongruous or absurd results.

The chief purpose of the act of 1897 was to provide a means whereby the government might acquire the title and control of lands covered by private ownership or claim within the limits of forest reservations, with the view to promoting the objects for which the reservations were established, and whereby the owners or claimants of such lands might obtain in exchange therefor other lands outside the reservations, with the view to relieving themselves of the disadvantages resulting from the withdrawal from settlement and other disposition of the public lands surrounding them. It was provided that lands so held might be exchanged for an equal quantity of "vacant land open to settlement" outside the reservations. The owners or claimants of lands within a forest reservation, if they desired to avail themselves of the proffered exchange, were required to relinquish to the government the lands so owned or claimed by them, and they were to make selection of the lands to be taken in exchange. Except where otherwise specially provided, and subject to the conditions that only lands vacant and open to settlement could be taken, it was the purpose to permit the selections to be made anywhere within the limits of the public domain. With this vast area from which to make selections, it can not reasonably be claimed that a construction of the word "vacant" such as is contended for in the motion for review is necessary to the

effective operation of the statute, or to the accomplishment of the objects for which it was enacted.

Congress had the unquestioned power to restrict the right of selection as it chose, and could so legislate as to avoid bringing a new and probably numerous class of applicants for public lands into antagonism with settlers upon and occupants of the public lands, who were there at the invitation or by the license of the government, and whose settlement or occupancy was not shown upon the land office records. There are many instances in public-land legislation where, in providing a new mode of disposing of public lands, Congress has been careful to avoid contests between individuals and to prevent claimants under the new law from disturbing the possessory rights or imperfect claims of others. In providing a field for selection embracing large portions of twenty-three States and two Territories (Arizona and New Mexico), as is done in the act of 1897, a purpose on the part of Congress to restrict selectors under that act to lands which are not occupied but are vacant is not at all strange or unreasonable. The words of the statute, in their primary or ordinary sense, are plainly expressive of an intention to make this restriction, and to refuse to give effect to the intention thus expressed would be violative of settled and important rules of statutory construction and not permissible.

The act of Congress of February 25, 1885 (23 Stat., 321), is referred to. By that act inclosures of the public lands by any person, association, or corporation, not based upon a claim or color of title made or acquired in good faith, or upon any claim of right asserted in good faith with the view to entry under the general land laws, and the exclusive use and occupancy of any of the public lands, without claim, color of title, or asserted right of entry, as aforesaid, were declared to be unlawful and prohibited. It is urged that Congress could not have intended the word "vacant," in the act of 1897, to be understood in its primary or ordinary sense of unoccupied, for, it is said, that would have been equivalent to recognizing as lawful a thing declared to be unlawful by the act of 1885.

The conditions which led to the passage of the act of 1885, and the evil intended to be corrected, are, in a measure, disclosed by the report made by the Public Lands Committee of the United States Senate, when the bill was pending before that body, where it was said:

> The necessity of additional legislation to protect the public domain because of illegal fencing is becoming every day more apparent. Without the least authority, and in open and bold defiance of the rights of the government, large, and oftentimes foreign, corporations deliberately inclose by fences areas of hundreds of thousands of acres, closing the avenues of travel and preventing the occupancy by those seeking homes. While those fencing allege the lands within such enclosures are open to settlement, yet no humble settler, with scarce the means for the necessaries of life, would presume to enter any such inclosure to seek a home.

A construction of the act of 1897 which would give to it a meaning different from that flowing from the ordinary and natural import of its language, is not required in order that the two acts may stand together and full force and effect be given to each. The meaning accorded to the word "vacant" in the act of 1897 by the decision under review does not operate to impair the effectiveness of the act of 1885. It produces no incongruity in the two acts.

In any event, the full scope and effect of the act of 1885, as bearing upon that of 1897, is not a matter that need be now determined, for the case here under consideration is not one wherein the proofs accompanying the selection are to the effect that there was no occupancy of the land other than one shown to be violative of the act of 1885 or otherwise unlawful. It will be sufficient to consider the question arising upon such a state of facts when a case is presented embodying them. Here the selector presented no proof whatever respecting the condition of the selected land, that is, whether occupied or unoccupied, and if occupied, whether lawfully so or not. Nor do the papers presented by the protestants assist the selector in this matter, because so far as they make any suggestion respecting the condition of the lands in controversy at the time of their attempted selection it is to the effect that they were occupied for the purpose and in the course of mining exploration and work, which were being conducted with a view to the development and utilization of deposits of mineral oil believed to exist therein; and as indicating that this occupancy was in good faith and within the protection of the mining laws, it appears, by admission of the parties, that this mining exploration and work resulted in the production of petroleum oil in large and valuable quantities, giving to the land an unquestioned mineral character.

It is insisted that this Department has held the word "vacant," in the act of 1897, to have no reference to the physical status of the land authorized by the act to be selected; that such was the ruling at the time the selections here in question were filed; and that in the decision under review a change of ruling was made, to the prejudice of rights acquired by this selector under the former ruling. The case of F. A. Hyde, decided April 14, 1899 (28 L. D., 284), is cited. An examination of that case shows that the principal issue was whether unsurveyed as well as surveyed lands could be selected under the act of 1897. On that question the Department stated and held as follows:

> It is to be observed that the words "surveyed" or "unsurveyed" do not anywhere appear in the provision of the statute hereinbefore set out, nor is there any language therein which indicates an intention to limit the selection of lieu land under the said provision to surveyed lands. The only limitation as to kind or condition of the lands subject to lieu selection thereunder is contained in the words "vacant land open to settlement." This language is so clear and explicit as to leave no room for construction. "Vacant land open to settlement" is any public land to which rights may be initiated by settlement, under existing laws. Unsur-

veyed, as well as surveyed, lands for many years past have been and still continue to be open to settlement. It was entirely competent for Congress to limit such selections to surveyed lands, or to extend them to both surveyed and unsurveyed lands, and the words "vacant land open to settlement" including as they do unsurveyed as well as surveyed lands, must be given their proper legal effect. It follows that lieu selections, under the said provision, are not confined to surveyed lands, but may also be made of unsurveyed lands.

It is perfectly clear, from the language quoted, that what the Department decided was that the words "vacant land open to settlement," in their proper legal effect, include unsurveyed as well as surveyed lands, and that, therefore, selections under the act could not be confined to surveyed lands, but might embrace unsurveyed lands as well. No question as to the interpretation of the word "vacant" separately from the words "open to settlement" was considered. No such question was involved in the case. The issue raised with respect to the words "vacant land open to settlement" was, whether they embraced unsurveyed lands, and that only. It was held they did. That holding was not based upon the word "vacant," but upon the words "open to settlement," and this the decision plainly shows. The case does not justify the position assumed by counsel with respect to it.

The ruling of the Department in the case of Baca Float No. 3, decided July 25, 1899 (29 L. D., 44), also prior to the filing of these selections, is important to be observed in this connection. That case involved the construction of a statute similar to the one here under consideration. By act of June 21, 1860 (12 Stat., 71-2), Congress granted to the heirs of Luis Maria Baca the right to select, in lieu of certain lands claimed by them under a Mexican grant in the vicinity of Las Vegas, New Mexico, "an equal quantity of vacant land, not mineral," in square bodies not to exceed five in number, in the Territory of New Mexico. One of the issues presented by the record was stated in the decision as follows:

> Is the question as to the character of the land selected—that is, whether vacant and not mineral and therefore subject to the grant, or occupied, or mineral, and for that reason not subject to the grant—to be determined with relation to the date of the selection, or with reference to the date of the approval of the survey of the claim?

After considering and deciding that and other questions in the case, the Department directed the Commissioner of the General Land Office, in accordance with the principles announced in the decision, to cause a survey of the grant to be made, based upon the selection of June 17, 1863. With respect to such survey it was said:

> Specific directions should be given that lands vacant, and not known to be mineral at the date of said selection, are to be surveyed as subject to the grant, and that all lands ascertained by the surveyor-general to have been occupied, or known to be mineral, at such date, if any, within the boundaries of said selection, must be excluded from the survey as not being subject to the grant.

Certain language used by the supreme court in the case of Shaw *v.* Kellogg (decided May 22, 1898; 170 U. S., 312, 332) is also of interest

in this connection. One of the series of selections authorized by the act of June 21, 1860 (selection No. 4), was involved in that case. The court, among other things, said:

> The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico.

It is thus seen that before these selections were filed, and within a period of less than two years prior to their filing, both the supreme court and this Department had interpreted the word "vacant," used in an act which, with respect to the matter here under consideration, is the same as the act of 1897, to mean *unoccupied*. There is no foundation for the assertion of counsel to the effect that these selections were made in the light of an established interpretation, either departmental or judicial, of the word *vacant* as applied to the public lands generally, or as used in the act of 1897, contrary to that given in the decision under review.

It is objected that the language of the court in the Shaw-Kellogg case, defining the word "vacant" in the act of 1860 as meaning unoccupied, is mere *obiter*, and, for that reason, no weight should be given to it. In its opinion the court said:

> It will also be perceived that Congress did not permit this location to be made anywhere in the public domain, but only within the limits of the Territory of New Mexico. It was not like a military land warrant, subject to location upon any public lands, but only a grant which could be made operative within certain prescribed and comparatively narrow limits—limits not even so broad as those of the territory ceded by Mexico. There were then but few persons living in New Mexico; it contained large areas of arid lands; its surface was broken by a few mountain chains, and crossed by a few streams. It was within the limits of this territory, whose condition and natural resources were but slightly known, that Congress authorized this location.

Then follows the language first quoted from the decision, wherein it is stated that the only exceptions to the right of selection granted the Baca heirs within the limits of New Mexico were these:

> They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral.

The objection relates to the statement of the first exception. Viewed in the light of the earlier decisions in Atherton *v.* Fowler and Hosmer *v.* Wallace, *supra*, wherein the court used the word *vacant* in the sense of unoccupied, and in a manner entirely free from the objection here raised, this statement in Shaw *v.* Kellogg, even if it be *obiter*, is nevertheless of importance and weight as showing what the court considers the ordinary and natural import of the word to be when applied to the public lands.

The case of Cosmos Exploration Company *v.* Gray Eagle Oil Company, decided November 15, 1901 (112 Fed. Rep., 4), by the circuit court of appeals for the ninth circuit, involved the selection, under the act of June 4, 1897, by one J. R. Johnston, of certain lands situated in the same township and section as the lands here in controversy. Practically the same questions were presented in that case as in this. The court held that the word "vacant" was used in the act in the sense of *unoccupied*, the same as held by the Department in the decision under review. In the course of its opinion the court, among other things, said (pp. 14, 15):

From the allegations of the bill, it appears that at the time of appellants' selection of the lands in question, no discovery of any mineral had been made. Appellees could not, at that time, have acquired any title to the lands included in their locations. The discovery of mineral was essential for that purpose; but they were not trespassers upon the public lands of the United States. They had a lawful right to be there. They were in occupancy of the land they had located. They claimed it to be mineral and were diligently at work to prove it to be such. Under these circumstances it can not, in our opinion, be said to be vacant land at the time of appellants' selection thereof under the provisions of the act of 1897. The land was not vacant and open to settlement at that time because it was then occupied by the defendants' grantors under a claim and color of right. It matters not that they had not at that time acquired any rights against the United States.

* * * * * * *

The fact that defendants under their mining locations had not, at the time of Johnston's selection of the land as agricultural, discovered any petroleum, that being the mineral for which their locations were made, shows that they had not perfected their locations under the mining laws; that their absolute right to the exclusive possession of the ground covered by their locations, as against the government of the United States, had not accrued to them, and the government might, if it had seen fit to do so, have terminated the license theretofore given to them to occupy the land, and congress might have granted the land to others. But under the act of June 4, 1897, it will be observed that congress did not grant the right under the forest reserve act to select any lands unless they were vacant. It therefore necessarily follows that, if the land was not vacant and open to settlement, Johnston did not acquire any title to the lands in question. He was, in the eye of the law, a trespasser, because so far as that act is concerned the lands were excepted from such selection, and by attempting to make such selection he was a mere intruder and his grantee is not in a position to question the validity of the defendants' locations.

It is further contended that, even if it be true that the word "vacant," used in the act of 1897, was properly defined in the decision under review, the land department is without the power or authority, by rules and regulations, or otherwise, to require proof of the vacancy or non-occupancy of lands selected under said act to be furnished by the selector as a condition to the acceptance of the selection. Such is not the law.

That the administration of this statute falls within the jurisdiction of the land department there can be no doubt (Bishop of Nesqually *v.* Gibbon, 158 U. S., 155, 167; Knight *v.* Land Association, 142 U. S., 161, 177). Nor can there be any question of the authority of the land department to make rules and regulations appropriate or necessary to

secure the convenient and effective administration of any act of Congress which falls within its jurisdiction (Sec. 2478, R. S.). Besides being specially authorized by statute, such rules and regulations are in many instances absolutely essential to the proper and efficient exercise by the land department of the jurisdiction conferred by law upon it (See Secs. 441, 453, Revised Statutes), and even if there were no special statute on the subject, the power to make such rules and regulations would arise from the inherent necessities of the case.

Every tribunal, upon which the duty of determining contested questions of law or fact is imposed, must of necessity possess the power, when not otherwise specially provided in the law imposing the duty, to establish and maintain rules of practice and methods of procedure whereby to execute the law and to administer evenhanded justice to litigants. The principle is axiomatic.

Wherever, by act of Congress, provision is made for the disposal by selection, entry, and patent, of portions of the public lands of a designated class and character, as was done by the act of June 4, 1897, it is the duty of the land department to ascertain and determine whether lands sought to be acquired under the act are of the class and character thereby made subject to disposal. Until such determination has been made and the lands found to be such as the act describes, entry thereof can not be lawfully allowed. The evidence to enable this to be done, when such evidence does not, and could not from the conditions to be inquired into, appear from the land office records, must of necessity be furnished by those who seek title under the act. The land officers are not required, and from the nature of things could not be required, to take judicial cognizance of the physical condition of lands with respect to which, in the discharge of their duties, they are called upon to act.

Lands occupied by others or known to be valuable for minerals are not subject to selection under the act of 1897. Whether so occupied or known to be valuable for minerals are questions which can not always, or even ordinarily, be determined by anything appearing upon the public records. For the purpose of such determination resort must generally be had to outside evidence. This evidence must be furnished by the selector. It is his duty to show, in so far as physical conditions are concerned, that the land to which he seeks title is of the class and character subject to selection. He can not entitle himself to a patent until he has made such showing. Until then his selection is not complete. Until then he has not complied with the terms and conditions necessary to the acquisition of a patent, and can not be regarded as having acquired any vested interest in the selected land.

The law is settled that until a party seeking title to public lands has complied with all the requirements essential to the establishing of his right to a patent, the right does not vest. See the authorities

cited on this subject in the decision under review. It was said in that decision that—

> The right to a patent is not acquired in any case until the proofs are such that patent could be issued upon them if nothing were shown to the contrary. As long as anything remains undone which it is essential should be done by the selector in order to entitle him to a patent, the right thereto does not vest.

It is not denied by the selector that proofs necessary to establish the right to a patent must be furnished before a patent may be rightfully issued for the selected land, but he contends that the furnishing of such proofs is not essential to the validity of the selection, and therefore not a condition to the vesting of equitable rights under it. The argument is, that if, at the time of filing the selection, the land, as matter of fact, though not shown by any proofs, is of the class and character subject to selection, the equitable title immediately vests in the selector, and that proofs to show the land to be of the requisite class and character may be furnished afterwards, at any time prior to the issuance of patent, to take effect as of the date of filing the selection, even though the condition of the land may have so changed in the mean time as to take it out of the class and character of land subject to selection.

The proposition can not be sustained. It is contrary to the established doctrine that, under proceedings in the land department to acquire title to public land, no equitable rights in the land are to be regarded as having become vested in the party seeking title until he shall have performed all the conditions and fulfilled all the requirements necessary to establish his right to a patent. It is opposed to the principle that as long as anything remains to be done by the party seeking title, which it is essential should be done before patent can be issued, the right thereto does not vest. The land department is not authorized to accept selections under the act of lands not shown, by proper proofs, to be of the class and character subject to selection. Certainly no right can vest in the selector until there arises the duty on the part of the land department to accept the selection.

The statement made in the briefs, to the effect that at the time of filing these selections (December 14, 1899) there was no rule or regulation of the land department which required that selections must be accompanied by evidence showing the selected land to be unoccupied, is not justified by the facts. The printed form of application set out in the decision under review (form 4–643) was prescribed by the Commissioner of the General Land Office in April, 1898, and approved by the Secretary of the Interior May 9, 1899 (28 L. D., 521, 524), as in said decision stated. It contained the following clause:

> There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from encumbrance of any kind; also that all taxes thereon, to the present time, have been paid; and an affidavit showing the lands selected to be non-mineral in character and unoccupied.

This form of application was in use at the time the selections were filed. No other had been issued with the approval of the Secretary of the Interior. The clause requiring the selector to submit with his selection "an affidavit showing the lands selected to be non-mineral and unoccupied" is clear and unequivocal. There can be no doubt as to its meaning.

It was stated by counsel at the oral argument, and the statement is repeated in a brief since filed, that the form of application in use at the time these selections were filed contained a requirement that "evidence of publication" should be submitted with all selections, a thing impossible inasmuch as publication was not required until after the selections were filed. Counsel are mistaken. The facts are, that prior to January, 1900, the only prescribed form of application was the one (4–643) copied into the decision under review. At the date last named a new form, like the old one, excepting that, after the words "encumbrance of any kind" in the clause above quoted, the words "evidence of publication" were inserted, was printed at the instance of the General Land Office. The additional words were inadvertently inserted without any authority from the Secretary of the Interior, who afterwards directed that the changed form be not used. This matter, however, has no bearing upon the case under consideration.

One other matter should be mentioned. It is urged that, even if the departmental regulations, at the time of the filing of the selections in question, required that proof of the vacancy or non-occupancy of the selected land should accompany the selections, the acceptance of these selections by the local land officers in the absence of such proof was a waiver of the requirement, and that such waiver is binding on the government.

The proposition is unsound. If followed as a rule of law the Secretary of the Interior would be practically shorn of the supervisory power and authority over the disposal of the public lands, vested in him by sections 441, 453, and 2478 of the Revised Statutes. The action of the local land officers upon questions of law or fact respecting the disposal of the public lands does not conclude their superior officers or the government. Such action is, in all cases, reviewable by the Commissioner of the General Land Office, and by the Secretary of the Interior, as the proper administration of the law or the demands of justice may require (Orchard *v.* Alexander, 157 U. S., 373; Knight *v.* Land Association, 142 U. S., 161; Parsons *v.* Venzke, 164 U. S., 89).

It would serve no useful purpose to discuss all the authorities which have been cited, or to specially state all the arguments advanced. It is enough to say, in conclusion, that, after careful consideration of all that has been presented, the Department finds no error in the original decision. The rulings complained of are accordingly adhered to, and the motion for review is overruled.

188 *Rule to Show Cause.*

Filed April 16, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA on the Relation of The Riverside Oil Company (a Corporation), Petitioner,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Defendant.
} At Law. No. 45343.

Upon consideration of the relation and petition of the Riverside Oil Company, filed in the above-entitled cause, and of the exhibits filed with the said petition, it is this 16th day of April 1902, by the court ordered that the defendant Ethan A. Hitchcock, Secretary of the Department of the Interior of the United States of America, show cause, if any he has, before this court on the 25th day of April, 1902 at ten o'clock, why a writ of mandamus should not be issued to him as prayed by said petitioner, provided that a copy of this rule be served on said defendant not later than the 19th day of April, 1902.

A. C. BRADLEY, *Justice.*

Marshal's Return.

Served copy of within order on defendant, April 16, 1902.
AULICK PALMER, *Marshal.*
B.

189 *Answer of Ethan A. Hitchcock, &c.*

Filed May 14, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA *ex Rel.* Riverside Oil Company, a Corporation,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.
} At Law. No. 45343.

The answer of Ethan A. Hitchcock, Secretary of the Interior, to the rule to show cause why a writ of mandamus should not issue on the relation of the above-named petitioner.

This respondent, admitting, upon information and belief, the allegations of the first five paragraphs of the petition of the said

petitioner to be true, in answer to the said petition and as cause against the said rule, shows as follows:

1. In the local land office at Visalia, California, on December 14th, 1899, one C. W. Clarke, claiming to be the owner of two certain tracts of land under patents from the United States and included within the limits of a public forest reservation, did file two separate applications to select in lieu thereof under the act of June 4, 1897, 30 Stat., 36, the following portion of the public land, to wit:

The N. ½ of the S. E. ¼ of sec. 4, T. 29 S., R. 28 E., M. D. M. and the S. ½ of the N. E. ¼ of said sec. 4, T. 29 S., R. 28 E., M. D. M.

With each of said applications the said Clarke filed an affi-
190 davit in support thereof, as hereinafter set forth and described and two deeds of conveyance purporting to convey to the United States the two said tracts of land embraced within the said forest reservation.

2. A form of application to select other lands under said act of June 4, 1897, was prescribed by the Commissioner of the General Land Office in April, 1898, and approved by the Secretary of the Interior May 9th, 1899, which was in force when said applications were made and which contained among other things the following clause:

There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from incumbrance of any kind; also that all taxes thereon, to the present time, have been paid; and an affidavit showing the lands selected to be non-mineral in character and unoccupied.

The allegation showing the lands selected to be non-mineral in character and unoccupied was an essential averment for the reason that unless the said lands were non-mineral in character and unoccupied the same were not vacant lands open to settlement within the intent and meaning of the said act of June 4, 1897.

3. The affidavits above mentioned as having been filed with the said application were made out upon a printed form which is in the words and figures following, to wit:

(Act of June 4, 1897.)

Affidavit of Non-mineral Character and Non-occupancy.

U. S. LAND OFFICE.

—— —— being duly sworn according to law deposes and says that he is over the age of 21 years, a citizen of the United States and of the State of —— and a — by — and is well acquainted with the character of the following-described land and with each and every legal subdivision thereof, to wit:

191 That there is no occupation of said land adverse to the selection thereof under the act of June 4, 1897, by —. That the said tract applied for is agricultural in character and contains no known deposits of coal, or other minerals, and is not subject to entry under

the coal or mineral land laws of the United States: *This affidavit is made upon the evidence found upon the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground.*

That he has frequently passed over the same and his personal knowledge of said land is such as to enable him to testify understandingly in regard thereto; that there is not to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposits; that no portion of said lands is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, *so far as deponent knows;* and that the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof, and that his post-office address is ——,

—— ——.

But the said applicant Clarke erased from the said form the following words, to wit: "That there is no occupation of said lands adverse to the selection thereof under the act of June 4th, 1897, by," and the words following, to wit: "That no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise," and to the averment in said affidavit that the said land contains no known deposits in coal or other mineral and is not subject to entry under the coal or mineral land laws of the United States, the said applicant Clarke added the words, "This affidavit is made upon the evidence found upon the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground;" and to the averment in said affidavit that the application was not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, the said applicant Clarke added the words following: "So far as deponent knows."

192 And this deponent shows that each and every of the allegations erased and omitted from the said affidavit by the said Clarke were necessary and indispensable allegations for the purpose of enabling the said Clarke to select the said lands in lieu of the land proposed to be relinquished, for the reason that if the said lands were occupied adversely to the selection thereof under the act of June 4th, 1897, by any person or persons, or if any portion of said land was claimed for mining purposes under the local customs or rules of miners or otherwise, which said local customs or rules of miners are by act of Congress made part of the mining laws of the United States, then the said lands were not

vacant lands open to settlement within the intent and meaning of the said act of June 4th, 1897. And this respondent further avers and shows that the words added to the said affidavit of the said Clarke as aforesaid negatived and destroyed the force and effect of the averment of the said affidavit as to the supposed known character of the said land as non-mineral and as not being subject to entry under the coal and mineral land laws of the United States.

4. Thereafter, on February 6th, 1900, the Kern Oil Company filed a protest against the said selections and each of them, which said protest was supported by affidavits alleging in substance that the said Kern Oil Company and its predecessors in interest were at the time of the filing of said selections and had continuously been, and at the time of the protest were, in the possession and occupancy of the lands aforesaid, claiming, working and developing the same under certain placer mining locations made June 11th, 1899, known as the "Fossil and June Bug claims," that said lands were of great value for
193 the deposits of petroleum oil contained therein, and were known to be valuable for such deposits when the said selections were filed and were and are worthless for agricultural purposes, that the said lands lie in one of the greatest mineral oil belts in the State of California, and in the immediate vicinity of other valuable oil-mining claims; that the oil-bearing formation underlying the land is flat or horizontal, known as a blanket formation; that Clarke well knew the mineral character of the lands when he selected the same; and that the filing of said selections was an endeavor on his part to fraudulently obtain title to mineral lands under the act of June 4th, 1897. On February 12th, 1900, J. F. Ellwood and others filed separate protests against said selections alleging possession and occupancy of the land for oil-mining purposes substantially to the same effect.

5. Thereafter the matter in contest came on for hearing before the Commissioner of the General Land Office, who, after a full, fair and impartial hearing of the said applications and affidavits in support thereof and the protests and affidavits in support thereof decided that the allegations made in the protests should be investigated at a hearing to be conducted in accordance with the following principles, viz:

That inasmuch as the selections had not yet been approved by the Land Department and consequently the lands embraced therein had remained open to occupancy or exploration for minerals, evidence with respect to their present condition and as to whether vacant or unoccupied, and with respect to their present character as to whether known to contain valuable mineral deposits or not, should be taken and received for the purpose of determining whether or not the said selections should be approved.

From which said decision the said Clark appealed to the Secre-
194 tary of the Interior, and such appeal came on duly to be heard.

6. Whereupon the said Secretary of the Interior, in the exercise of the duty imposed upon him by law to hear and determine

an appeal from the Commissioner of the General Land Office, causes and controversies relating to the public lands of the United States and claims therefor, after a full, fair and impartial hearing and due and deliberate consideration of the applications, affidavits, briefs, printed and oral arguments made to and before him, and the assistant attorney general for the Interior Department acting in that behalf, did, on April 25th, 1901, formally and officially decide that inasmuch as the selector Clarke, in making applications for the said lands had not, by proper averments or by any averments, shown or set forth that the said lands were, at the time of said selection, vacant lands open to settlement within the intent and meaning of the said act of June 4th, 1897, of which fact of vacancy at such date, as a matter of fact, the said selector was, and the Land Department was not and could not have been cognizant, but, so to set forth and show had wholly failed and neglected and wilfully refused, theretofore, the said selector had not, in and by his said applications and affidavits in support thereof, shown himself entitled, as of the date of said attempted selection, to select the said lands or to obtain a patent therefor, but, on the contrary, had failed to comply with the requirements of the land and to furnish the proofs necessary to validate the said attempted selection or to enable the Land Department to issue any patent therefor or to vest in him, the said Clarke, any right to the same, and that, in consequence of such failure, the lands remained the property of the United States and open to exploration for mining purposes or to occupation and entry under the laws, and within the jurisdiction and
195 control of the Land Department. And inasmuch as it further appeared in proof and was admitted that, while the said lands so remained the property of the United States and so opened to exploration, or to occupation and entry, and before the said selector Clarke had, by proper averments, shown that the said lands were subject to selection or that he was entitled to select the same as vacant lands open to settlement, the protestants had gone into possession and occupancy thereof and had made discovery of petroleum therein and were claiming, working and developing the same under certain placer mining locations under the laws of the United States in that case made and provided; and inasmuch as before the said requirements and conditions had been complied with it became known and was admitted that the said lands were in point of fact valuable for mines and minerals and worthless for agricultural purposes, therefore, the said supposed selections of the said Clarke should not be and were not approved and the same were accordingly rejected, which decision is referred to in the petition herein and a copy of which is filed therewith marked Exhibit "T."

7. Respondent further shows, that, after the decision aforesaid, said petitioner prosecuting in the name and right of the said Clarke, made a motion for a review of the said decision, upon which motion, the said petitioner was by his counsel, as well as by printed briefs and arguments, fully, fairly and impartially heard.

8. Thereupon, after the rendition of the said decision and after

the filing of the motion for a review thereof, and while the same was depending before the said department, to wit, on June 5th, 1901, the petitioner, acting in the name and in the right of the said Clarke, caused to be filed in the Land Department two certain affida-
196 vits in support of the two selections by him made respectively, setting forth that the said selected lands were unoccupied at the date of the said attempted selection; which said affidavits this respondent avers were wholly ineffectual in law to vest any right in petitioner or to entitle him to the grant of a patent for said land, either as of the date of the said supposed selection, which was nearly two years prior to the filing of the said affidavits, or as of the date of the said filing, because of the fact that prior to said filing the contestants had entered upon the said lands and were in possession and occupancy thereof and were claiming, working and developing the deposits of mineral found therein and because of the fact that the said lands had thereby, and before the filing of the said affidavits, become known as valuable for minerals and had acquired the known character of mineral lands under the laws of the United States and as such were not open to settlement.

9. A hearing having been granted upon said motion for review, the same came on for oral argument and for hearing on October 8th, 1901, before the assistant attorney general for the Interior Department acting for the Secretary of the Interior in that behalf, and thereafter, upon mature, careful and deliberate consideration, as well of the oral argument as of the printed briefs and arguments filed on the part of the said petitioner, the said Secretary, this respondent, acting with the advice of the said assistant attorney general for the Interior Department, decided that the department could find no error in the original decision and accordingly adhered to the rulings contained therein and overruled the motion for review, a copy of which said decision, bearing date April 12th, 1902, is filed with the petition herein marked Exhibit "Y."

197 10. And this respondent denies that he has illegally or arbitrarily held or decided any matter or thing whatsoever in respect of the said application for selection, and he avers that by the laws of the United States the duty is imposed upon him to construe the acts governing the disposition of public lands of the United States and of applying the same to cases coming before him on appeal from the Commissioner of the General Land Office; that in pursuance of the duties so imposed he was required to construe and apply the terms of the act of Congress of June 4th, 1897, wherein it was provided that the owner of land included within the limits of the public forest reservation might select in lieu thereof a tract of vacant land open to settlement, and that he accordingly did, in the exercise of his judgment and discretion in that behalf construe the said term "vacant land open to settlement" to exclude land in the actual occupation of any person or persons under the local customs or rules of miners which said customs and rules are by statute incorporated into and became part of the laws of the United States; that the Commissioner of the General Land Office, under the direction of the Secretary of the Interior,

is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of laws relating to public lands; that in the exercise of his authority it became and was his duty to make regulations to carry into execution the act of June 4th, 1897, for the selection of lands in lieu of lands included within the limits of the public forest reservation; that in pursuance of such duty he did, under the direction of the Secretary of the Interior, by a form approved by the Secretary on May 9th, 1899, make and establish a regulation for the execution of said law which said regulation required that there should be submitted with the application to se-
198 lect an affidavit showing the lands selected to be non-mineral in character and unoccupied, and which said form of application was in force at the time when the attempted selections were made by the said Clarke; that the administration of the law relating to the selection of lands in lieu of lands included within the public forest reservation was wholly within the jurisdiction of the said Commissioner of the General Land Office, under the direction of the Secretary of the Interior; that in the exercise of this discretion said Commissioner in a proper proceeding for that purpose passed upon and decided the right of the said selector Clarke to the land so selected, and that an appeal to this respondent as Secretary of the Interior, authorized and charged with the supervision of the public business relating to public lands including mines, this respondent held and decided that, by reason of the failure of the said Clarke to show in due and proper form that the said lands were at the date of said selection subject to selection as vacant lands open to settlement, the attempted selection thereof must be rejected; wherefore it became and was unlawful for this respondent, as such Secretary, or for the Commissioner of the General Land Office acting under his direction, to order any patent or patents to the said lands to issue to the said Clarke as in the said petition prayed to be commanded.

ETHAN A. HITCHCOCK,
Secretary of the Interior.

ASHLEY M. GOULD,
U. S. Attorney for the District of Columbia,
HENRY H. GLASSIE,
Ass't U. S. Attorney, D. C.,
Solicitors for the Respondent.

199 DISTRICT OF COLUMBIA, *ss:*

I, Ethan A. Hitchcock, Secretary of the Interior, on oath, say that I have read the foregoing answer to the rule to show cause, and that the facts therein set forth of personal knowledge are true, and those set forth upon information and belief I believe to be true.

ETHAN A. HITCHCOCK,
Secretary of the Interior.

Subscribed and sworn to before me, a notary public in and for the District aforesaid, this 14th day of May, A. D. 1902.

WM. H. DE LACY,
[SEAL.] *Notary Public.*

Stipulation of Counsel as to Survey, &c.

Filed June 12, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA *ex Rel.* Riverside Oil Company
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.
} At Law. No. 45343.

It is stipulated that the official survey of township 29 south, range 28 east, M. D. M., California, approved by the surveyor general for the State of California February 28, 1855, which
200 includes the lands involved in this proceeding, returns the lands in said township as follows, viz:

"Between secs. 3 and 4. Land broken. Soil 2nd rate.

"Between secs. 4 and 9. Land level. Soil 2nd rate.

"Between secs. 4 and 5. Land little rolling. Soil 2nd rate.

"The southern portion of this township is very level with a slight sandy soil. The middle and northern portions are slightly undulating with a fair 2nd-rate sandy soil. Immediately along Kern river which runs through the northern portion of the township the soil is of a first-rate quality.

"There is but little bottom land to Kern river until you reach the western portion of the township. The ferry which crosses Kern river is situated in this township and is kept by an old man, the only person living in the township."

That in showing the position of the Kern river referred to in the field-notes, said field-notes further contain the following:

"In running line between secs. 2 and 3 set quarter corner at 39.50 chains and at 58.50 chains reached north bank Kern river.

"In running north between secs. 9 and 10 reached south bank Kern river at 68 chains and the north bank at 73 chains and course southwest."

JEFFERSON CHANDLER,
JOHN M. THURSTON,
Attorneys for Petitioner.
ASHLEY M. GOULD.
HENRY H. GLASSIE.

J. S. CHAPMAN,
Special Assistant of Counsel.

201 *Demurrer to Answer of Defendant.*

Filed June 12, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES *ex Rel.* RIVERSIDE OIL Company
vs.
ETHAN A. HITCHCOCK, Secretary of Interior. } No. —. At Law.

The petitioner demurs to the answer of the defendant, and says that the same is insufficient and bad in form and substance.

JEFFERSON CHANDLER,
JOHN M. THURSTON,
Attorneys for Petitioner.

Among the matters of law intended to be argued in support of said demurrer are:

1. That the matters set up are insufficient in form and substance to justify the action of the defendant complained of.
2. That the said matters show that the said defendant acted unlawfully and arbitrarily in the premises.
3. That the said matters show that the petitioner is entitled to patents for the lands in question.
4. That the defendant has failed to set up a good defense to the petition.

202 *Order Overruling Demurrer.*

In the Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA *ex Rel.* RIVERSIDE Oil Company, Petitioner,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Respondent. } No. 45343. Law.

This cause came on to be heard upon the petition and the exhibits filed therewith, the answer and return of the respondent and the exhibits filed therewith, the demurrer of the petitioner filed herein on June 12th, 1902, and the stipulation of counsel as to the surveyor's return of certain lands filed on June 12, 1902: Upon consideration whereof it is, this 25th day of June, 1902, adjudged and ordered that said demurrer be and the same is hereby overruled.

HARRY M. CLABAUGH,
Associate Justice.

203 *Motion for Rehearing of Demurrer.*

Filed June 3, 1902.

In the Supreme Court of the District of Columbia.

THE UNITED STATES OF AMERICA *ex Rel.* THE Riverside Oil Co.
vs.
ETHAN A. HITCHCOCK.
At Law. No. 45343.

Comes now the petitioner, by its attorneys and moves the court to vacate the order passed herein overruling petitioner's demurrer to the defendant's answer and grant a rehearing of said demurrer and for cause shows:

1. The court erred in overruling the demurrer.

2. The court erred in not sustaining the demurrer and giving judgment on the pleadings for petitioner.

3. The court erred in not holding upon the pleadings that the exchange of lands in the petition mentioned was complete except the delivery to petitioner of the patent for the lands selected.

4. The court erred in holding that any proof of the character of the land outside of the Land Office records was essential to the selection or could in law be demanded of the selector as a condition precedent to, or as a part of, the selection. And since the decision of the court in this case, the defendant has transmitted a communication to Congress calling attention to the cases in the Federal courts where his authority to require affidavits not prescribed by the statute has been denied and asking that a law be passed giving
204 him such authority, a true copy of which is filed herewith and made part hereof.

5. The court erred in holding that the form relied upon by the defendant, was a regulation of the Land Department.

6. The court erred in holding that under the act of June 4, 1897, any affidavit was required as a part of the selection.

7. The court erred in substituting in the act of June 4, 1897, the words "unoccupied land" for the words "vacant land."

8. The court erred in not accepting the admission of counsel for the defendant that no right or claim of right was made in behalf, or in the interest, of the protestants and that the issues in the case were wholly between the selector and the United States, as will appear from a true copy of an extract from the stenographic report of the argument filed herewith and made part hereof.

9. The court failed to give the petitioner the benefit of the presumptions of law and fact arising in the case, viz: That the United States occupied the lands at the date of selection and that the land when selected was non-mineral; and the admission in the pleadings that the land at the time of selection was vacant land open to settlement, as shown by the land records and non-mineral and unoccupied in fact.

10. The court failed to give the petitioner the benefit of the admission in the pleadings that dozens of patents had been issued under the law of June 4, 1897, in the absence of affidavits of any kind, and the benefit of the defendant's declaration in the
205 case of Hyde and that statute is too clear to admit of construction.

JEFFERSON CHANDLER,
W. C. PRENTISS,
M. A. BALLINGER,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

I, M. A. Ballinger, being duly sworn, says that he is of counsel for the above-named petitioner and that the writings filed herewith are true copies of an official communication transmitted to Congress by the defendant in the above-entitled cause and an extract from the stenographic report of Mr. Glassie's argument as revised by him.

M. A. BALLINGER.

Subscribed and sworn to before me this 3rd day of July, A. D. 1902.

[SEAL.] ALBANUS S. T. JOHNSON,
Notary Public.

206 Copy.

DEPARTMENT OF THE INTERIOR,
W. V. D. WASHINGTON, *June* 26, 1902.

The chairman of the Committee on Public Lands, House of Representatives.

SIR: I inclose a draft of a proposed bill "relating to proofs in homestead and other claims to public lands and punishing false swearing therein, and for other purposes."

Within the last few months, in criminal cases arising under the public land laws, there have been five or six decisions adverse to the United States and in opposition to many years' uniform practice in the Land Department. Whether correct or not, these decisions very seriously disturb the administration of the public land laws; if not correct, the Government has no satisfactory method of obtaining an authoritative decision to that effect, because appeals are not accorded to the Government where it is unsuccessful in the trial court in criminal prosecutions.

In two cases which have just been brought to my attention, it was held by a United States district judge that a homestead entryman who, to obtain the allowance of his application for a homestead entry, makes affidavit that the land is not mineral, when in fact he knows that it has been discovered and developed to contain valuable mineral deposits and is located and claimed under the mining laws,

cannot be prosecuted for perjury, because, under section 2990 of the Revised Statutes, as well as under that section as amended by
207 the act of March 3, 1891 (26 Stat., 1095, 1098), it is prescribed that the homestead applicant shall make a certain specified affidavit (having no reference to the mineral or none-mineral character of the land), "and upon filing such affidavit with the register and receiver" and upon the payment of a certain fee to such officers, "he or she shall thereupon be permitted to enter the amount of land specified." The judge took the view that this section, by prescribing the subject-matter to be covered by the affidavit and then declaring that upon the filing of that affidavit and paying the requisite fee the entry shall be allowed, in effect declared that no other affidavit or proof shall be required as a condition to the allowance of the entry; and that a requirement that in this affidavit or any additional one there shall be a showing that the land is not mineral, is something beyond the statute and which the Land Department is not authorized to require, and therefore perjury cannot be predicated thereon.

Another United States judge has very recently held that under section 2291 of the Revised Statutes a homestead entryman is not required to make personal oath to his compliance with law in the matter of inhabitancy and cultivation; that the proof of this is to be made "by two credible witnesses," and not by the entryman; and that if the entryman himself makes oath to his inhabitancy and cultivation, he does so unnecessarily and not in conformity to the statute, and therefore no crime can be predicated upon his swearing falsely therein.

In another case it was held that proof of the non-mineral character of the land cannot be exacted of the entryman or his witnesses at the time of the making of final proof, because section 2291 prescribes the matters to which such proof is to be directed,
208 and then declares that thereupon the entryman "shall be entitled to a patent." The holding is to the effect that this section, by prescribing what proof shall be required, and not mentioning the character of the land, precludes the Land Department from exacting any evidence upon this subject in connection with final proof.

Section 2294 of the Revised Statutes and amendments thereto authorize the administration of oaths in public land proceedings by a clerk of a court of record, and authorize proofs in land entries to be made before such clerk. In a very recent case it was held that these statutes do not authorize the administration of oaths by deputy clerks or the taking of proofs before them, and that perjury cannot be predicated upon a false oath taken before such deputy.

Under section 2302 of the Revised Statutes, and other laws, mineral lands are not subject to entry under the homestead law, save in a few excepted States to which the mineral laws do not apply and it has been the uniform practice of the Land Department, since the passage of the homestead law, to require the filing of a non-mineral affidavit by the homestead applicant as a condition to the

allowance of his entry. It has also been the uniform practice to require the entryman himself, who necessarily is best informed, to make personal oath, at the time of submitting final proof, to his compliance with the law in the matter of inhabitancy and cultivation.

Ever since the enactment of the statutes authorizing oaths and proofs in land proceedings to be taken and made before clerks of courts of record, it has been held, under the part of section one of the Revised Statutes which says "and the reference to any officer shall include any person authorized by law to perform the
209 duties of such office," that these oaths and proofs may be taken and made before a deputy of a clerk of a court of record, wherever by law a deputy is provided for and authorized generally to perform the duties of his principal.

The practice in these matters has long been evidenced by regulations which are believed to be authorized and justified by sections 441, 453, and 2478 of the Revised Statutes.

The decisions referred to herein, coming from judicial tribunals, cast a cloud over the proceedings of the character to which they refer, and are calculated, whether right or wrong, to produce incalculable mischief. It is submitted that this situation can best be corrected by legislation which will clearly set each of these matters at rest, without disturbing the existing practice or entailing greater expense or hardship upon public land applicants, and which will enable such reasonable requirements to be enforced as will safeguard the public interests and the transactions of honest claimants.

I beg to respectfully ask that this matter may receive the early attention of your committee.

Very respectfully,

(Signed) E. A. HITCHCOCK (*Secretary*).

Mr. GLASSIE: * * *

The issue in this case, if your honor pleases, is not an issue between the selector and the protestant or the contestant in any
210 sense; it is an issue between the selector and the United States. The protestant is not in this court, in any way, direct or indirect. He was not in the Land Department in respect to the matter which we have here to consider, except as a means of informing the United States that the land which the selector attempted to take under this act was not subject to be taken under that act. The issue is here, whether or not, by certain proceedings in the judicial department of the Land Department, a title—legal title, not the equitable title, but the legal title—is vested in the selector, so that the issuance of the patent has been reduced, shrunken, to a ministerial act.

* * * * * * *

Order Overruling Motion, &c.

Filed October 3, 1902.

In the Supreme Court of the District of Columbia.

U. S. *ex Rel.* RIVERSIDE OIL COMPANY
v.
ETHAN A. HITCHCOCK. } No. 45343.

This cause came on to be heard upon the motion of the petitioner for a rehearing whereupon it is this 3rd day of October, 1902, adjudged and ordered—that the said motion be, and the same is hereby overruled and that the order overruling the demurrer
211 be and the same is hereby confirmed with leave to plead within twenty days.

HARRY M. CLABAUGH, *Justice.*

212 Supreme Court of the District of Columbia.

THURSDAY, *October 23rd*, 1902.

Session resumed pursuant to adjournment, Hon. H. M. Clabaugh, justice, presiding.

THE UNITED STATES OF AMERICA on the Relation of The Riverside Oil Company, a Corporation, Petitioner,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior, Defendant. } No. 45343. At Law.

Comes again the petitioner herein by its attorneys, and in open court elects to stand upon its demurrer to respondent's answer herein filed. Whereupon, said demurrer having been heretofore overruled; it is considered and adjudged, that the rule to show cause issued herein be discharged; that the prayers herein of said petitioner be denied, that said petition be, and it is hereby dismissed at petitioner's costs.

From the aforegoing judgment, said petitioner by its attorneys in open court, notes an appeal to the Court of Appeals, of the District of Columbia, and prays that the amount of the bond be fixed.

Whereupon, bond for costs on said appeal is hereby fixed in the sum of one hundred ($100.00) dollars, with surety or sureties approved by this court, with leave to deposit in the registry of this court in lieu of such bond, the sum of fifty ($50.00) dollars.

213 *Memorandum.*

November 5, 1902.—Appeal bond filed.

214 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 157, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this record, in cause No. 45,343, at law, wherein The United States of America, on the relation of The Riverside Oil Company, a corporation, is petitioner, and Ethan A. Hitchcock, Secretary of the Interior is respondent, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 13″ day of December, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

215 In the Court of Appeals of the District of Columbia.

THE U. S. *ex Rel.* RIVERSIDE OIL CO., Appellant,
vs.
ETHAN A. HITCHCOCK, Sec'y of the Interior. } No. 1264.

It is hereby stipulated that the clerk shall in the printed record in the above-entitled cause, omit decision in Gray Eagle case pages 139 to 151, both inclusive, and second decision in same case, line 11 page 179 to page 187 both inclusive.

SHIRLEY C. WARD,
W. C. PRENTISS,
Attorneys for Appellant.
ASHLEY M. GOULD,
HENRY H. GLASSIE,
Attorneys for Appellee.

(Endorsed:) No. 1264. The U. S. of A. on the relation of The Riverside Oil Co., a corporation, appellant, *vs.* Ethan A. Hitchcock, Secretary of the Interior. Stipulation of counsel as to printing record. Court of Appeals, District of Columbia. Filed Dec. 15, 1902. Robert Willett, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1264. The United States of America on the relation of The Riverside Oil Company, a corporation, appellant, *vs.* Ethan A. Hitchcock, Secretary of the Interior. Court of Appeals, District of Columbia. Filed Dec. 13, 1902. Robert Willett, clerk.

WEDNESDAY, *January* 21*st*, *A. D.* 1903.

THE UNITED STATES OF AMERICA on the Relation of the Riverside Oil Company, a Corporation, Appellant, *vs.* ETHAN A. HITCHCOCK, Secretary of the Interior } No. 1264.

On motion the appellant is allowed one-half hour additional time in the argument. The argument in the above-entitled cause was commenced by Mr. Jefferson Chandler attorney for the appellant, and was continued by Messrs. H. H. Glassie and John S. Chapman attorneys for the appellee.

THURSDAY, *January* 22*d*, *A. D.* 1903.

THE UNITED STATES OF AMERICA on the Relation of the Riverside Oil Company, a Corporation, Appellant, *vs.* ETHAN A. HITCHCOCK, Secretary of the Interior. } No. 1264.

The argument in the above-entitled cause was concluded by Mr. John M. Thurston, attorney for the appellant.

THE UNITED STATES OF AMERICA on the Relation of the Riverside Oil Company, Appellants, *vs* ETHAN A. HITCHCOCK, Secretary of the Interior. } No. 1264.

Opinion.

(Mr. Justice Morris delivered the opinion of the court.)

This is an appeal from an order of the supreme court of the District of Columbia, refusing the issue of a writ of mandamus and dismissing a petition therefor.

The Riverside Oil Company, the petitioner for the writ, is a body corporate under the laws of the State of Nevada, and, as stated in the petition, is empowered to acquire and hold land in the State of California, wherein by the present proceedings it seeks to acquire some public land of the United States, as the assignee of the right of one C. W. Clarke. The purpose of its proceeding is to require the Secretary of the Interior Department to issue a patent to it for the lands in question.

By an act of Congress of March 3, 1891, (26 Stat. 1095), the President of the United States was authorized "from time to time to set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations," and by public proclamation "declare the establishment of such reservations, and the limits thereof." In pursuance of this act, the President, by public proclamation issued on February 14, 1893, established what is known as the "Cascade Range

forest reservation" in the State of Oregon. Within the limits of this reservation C. W. Clarke, heretofore mentioned, had become the owner of two tracts of land, one of 40 acres, and the other of 120 acres, and had received patents for them. Under an act of Congress of June 4, 1897 (30 Stat. 36) he and others similarly situated were authorized to surrender their lands to the United States, and to receive in exchange for them any other public lands of the United States which were vacant and open to settlement. The act, so far as it bears upon the present subject, is as follows:

"That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims."

On December 14, 1899, Clarke filed in the United States land office at Visalia, in the State of California, two separate applications for two distinct parcels of the public land in that State, to be taken by him in lieu of his lands in Oregon, within the Cascade reservation, for which he then and there filed deeds of conveyance to the United States: and in support of each application he filed an affidavit as to the non-mineral character of the land and their non-occupancy by other persons, such as had been prescribed by the Commissioner of the General Land Office, but with some modifications therein made by himself. These papers were all duly transmitted to the General Land Office in this city.

In order to carry into effect the provisions of the act of Congress of June 4, 1897, which authorized this exchange of lands, the Commissioner of the General Land Office, in April, 1898, prescribed a form of application, subsequently approved by the Secretary of the Interior, to be used by selectors of land under that act, which contained certain requirements to be complied with by the applicants, some of which are challenged by the relator in this case as being beyond the authority of the Commissioner or of the Secretary of the Interior to prescribe. The main requirement was that of an affidavit showing the lands selected to be non-mineral in character and unoccupied. As the controversy in this case has turned in great measure upon this affidavit, both in the Land Office, and in the Department of the Interior, and in this court, it is proper to insert it here in full, noting in brackets certain portions of it which were crossed out and eliminated by the affiant, and underlining in italics certain additions made by him. The affidavit as filed by the relator is in the following terms:

"—— —— being duly sworn according to law deposes and says that he is over the age of 21 years, a citizen of the United States and

of the State of —— and a —— by ——, and is well acquainted with the character of the following-described land and with each and every legal subdivision thereof, to wit ——

"[That there is no occupation of said land adverse to the selection thereof under the act of June 4, 1897, by —— ——.]

"That the said tract applied for is agricultural in character and contains no known deposits of coal or other minerals, and is not subject to entry under the coal or mineral land laws of the United States:

"*This affidavit is made upon the evidence found upon the surface of the ground: deponent does not undertake to express any opinion as to what may be under the ground.*

"That he has frequently passed over the same and his personal knowledge of such land is such as to enable him to testify understandingly in regard thereto; that there is not to his knowledge within the limits thereof any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposits; [that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise;] that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land, and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes, *so far as deponent knows;* and that the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof, and that his post-office address is ——"

Before making his selection, Clarke had applied to the register of the land office at Visalia for information as to vacant lands open to settlement, and was officially informed by him that the lands in question were such, according to the books and records in his office. Soon after his selection, however, and the filing of the application papers, a company known as the Kern Oil Company, on February 6, 1900, filed a protest against the selection, supported by affidavits to the effect that it and its predecessors in interest were at the time of the selection, and had continuously been, and at the time of the protest were, in the possession and occupation of the lands in question, working them under certain placer mining locations made on June 11, 1899; that the lands were valueless for agricultural purposes, but valuable for deposits of petroleum oil contained therein; and that Clarke well knew the mineral character of the land when he made his selection, and that the selection on his part was an attempt fraudulently to obtain title to mineral lands.

On February 12, 1900, one J. F. Ellwood and others filed separate protests against Clarke's selection, alleging possession and occupancy of the land by themselves for oil-mining purposes, substantially to the same effect as the Kern Oil Company.

When these protests were filed in the land office at Visalia, the contest raised by them was transferred to the General Land Office

in this city. Clarke moved to dismiss the protests on the ground that they were insufficient to raise a contest; but this motion was denied, and the Commissioner of the General Land Office proceeded to consider the application, the protests, and the affidavits on both sides. Upon consideration of them he determined "that inasmuch as the selections had not yet been approved by the Land Department and consequently the lands embraced therein had remained open to occupancy or exploration for minerals, evidence with respect to their present condition and as to whether vacant or unoccupied, and with respect to their present character as to whether known to contain valuable mineral deposits or not, should be taken and received for the purpose of determining whether or not the said selections should be approved": and accordingly he ordered an investigation to be had and a hearing given to the parties.

Appeal was taken by Clarke from this decision of the Commissioner to the Secretary of the Interior. Upon the appeal the Secretary held that, by the failure of Clarke at the time of making his application to show by proper averments that the lands were open to settlement and that he was entitled to make the selection, the lands remained thereafter the property of the United States open to exploration for mining purposes and for entry thereon under the mining laws; and that, inasmuch as, while the lands so remained open for exploration, the protestants had gone upon the lands and occupied them and made discovery of petroleum therein, and were working the same, and it became known and was acknowledged that the lands were valuable for minerals and worthless for agricultural purposes, the selection made by Clarke should be disapproved and rejected.

A motion for review of this decision was filed; and while this motion was pending and unacted upon, affidavits of the non-mineral character and non-occupancy of the land were filed on behalf of Clarke, which were apparently sufficient, if filed in time, to comply with the requirements of the regulations of the Land Office, and apparently would have been accepted by the office as *prima facie* sufficient at that time. But in determining the motion for a review the Secretary held that they came too late; and he affirmed his previous decision adverse to the claims of Clarke. This final decision was rendered on June 5, 1901.

On April 16, 1902, the relator caused the petition in this case to be filed in the supreme court of the District of Columbia for a mandamus to require the Secretary of the Interior to vacate his order rejecting Clarke's selection, to reinstate the proceedings, and to order a patent to be issued upon and in pursuance of Clarke's selections. A rule to show cause was issued; and the Secretary made return to the rule, and answered the allegations of the relator's petition. From the answer and the petition the facts herein stated have been taken. The respondent in his return claimed that his action was legal, that he was vested with discretion in the premises, and that, in the due exercise of such judgment and discretion, he had decided that Clarke was not entitled to a patent for the land selected by him.

To this return the petitioner demurred; and thereupon the cause was heard.

The court below overruled the demurrer. A motion for rehearing was entered: a rehearing was had; and again the demurrer was overruled. The petitioner having elected to stand by the demurrer, the court adjudged that the rule to show cause should be discharged, the prayers of the petition denied, and the petition itself dismissed. From the order of dismissal the present appeal has been taken.

The controversy is in fact, although not in form, one between rival claimants of the same tract of land. The relator claims it under a selection made in pursuance of the act of Congress of June 4, 1897. The parties who filed protests against it, claim under locations and entry made by them in pursuance of the act of Congress of February 11, 1897, (29 Stat. 526), entitled "An act to authorize the entry and patenting of lands, containing petroleum and other mineral oils, under the placer mining laws of the United States," and which provided:

"That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided* That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim or improvements were subsequent to the date of the passage hereof."

The location and entry made by these latter parties are alleged to have been made on June 11, 1899, which antedated the relator's selection by upwards of six months; and they claimed to have sunk wells and found petroleum deposits within a short time thereafter. The action of these locators is claimed by the relator to have been fraudulent, and their assertion of right in the present case to be vague and insufficient.

But here was evidently a question for the Land Department of the Government to settle. We deem it wholly unnecessary for us to follow counsel in their elaborate arguments upon the merits of it: for if the nature and character of the controversy were, as we think they were, such as are remitted by law to the arbitrament and determination of the Land Office, the courts of this District have no authority to review the decision, or to control it, by means of the writ of mandamus, whether it was right or wrong. The writ of mandamus, it is well settled, cannot be used to serve the purpose of an appeal or writ of error; nor can it be used to control the exercise of judicial discretion. It has been used in recent cases to control the action of executive officers of the Government, when, having exhausted their judicial discretion, they have denied without legal cause the just legal rights of private persons. But in our opinion no such case is presented here. The case which is presented is this:

In his undoubted legal right under the statute Clarke selected the lands in question, in lieu of those which he had surrendered, as

"vacant land open to settlement," having first ascertained from the register of the local land office that they were carried on his books of record as such; and he made application for a patent for them. In the view which we take of this case, it is probably of no consequence that the selector was required without warrant of law to accompany his application with an affidavit to the effect that the land was unoccupied and non-mineral in character, when the law required nothing of the kind from him (*Whitney vs. Taylor*, 158 U.S. 85). It became the right, and probably it was the duty of the Land Office to investigate the condition of the land and to ascertain whether such condition remained in fact what it purported to be on the records of the office. For these records are not conclusive either upon the relator or upon the United States. There might be matters *in pais*, mining claims, or other claims, not necessarily matters of record, and yet which might suffice to show that the land had been taken by individuals and was no longer open to settlement. Especially did it become the right and the duty of the Land Office, when notice of previous entry by other parties under another and equally effective statute, was given to it by the protests filed by such parties.

It is of no consequence here whether those protests were sufficient as a basis for a formal contest between the parties. They may have been vague, irregular, fraudulent, wholly without valid foundation in law. But they were presented to the office, and they tended to show that the land in question was not "vacant land open to settlement;" for it could not have been open to settlement if it had already been settled on under form of law by other parties.

What was said by the Supreme Court of the United States by Mr. Justice Field, in the case of *Barden vs. Northern Pacific Railway Co.* (154 U. S. 288, 326), is entirely appropriate here. There it was said:

"The law places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. * * * It is the established doctrine, expressed in numerous decisions of this court, that whenever Congress has provided for the disposition of any portion of the public lands of a particular character, and authorizes the officers of the Land Office to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the

existence of those facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack."

Appropriate also is what was said by the same court in the case of *Steele vs. Smelting Co.*, 106 U. S. 447, 450, where the jurisdiction of the Land Office is thus stated :—

"The Land Department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation."

Upon these authorities, it is very clear that, if there was here a contest between different claimants of the land, the Land Office had jurisdiction to adjudicate and determine the contest; and that, if there was no formal contest between rival claimants, yet it was still within the jurisdiction of the Land Office, in view of the protests that had been filed and of the proof that was taken, to determine whether the land selected by Clarke was "vacant land open to settlement." If it decided the controversy erroneously, if it made a mistake in its definition of what constituted "vacant land open to settlement," if it attached undue value to the protests, if it failed to inform itself fully in regard to all the circumstances, yet, as the case was within its jurisdiction, such considerations cannot be inquired into or reviewed in a collateral proceeding, least of all, in a proceeding for the writ of mandamus, the use of which is limited to the enforcement of a merely ministerial duty and to the protection of a plain, admitted, and unquestioned legal right that has been arbitrarily or without due warrant of law denied.

We express no opinion as to the merits of this case, or as to the correctness of the decision reached in it by the Secretary of the Interior. It would be improper for us to do so in the view which we take of it. It appearing very clearly to us that it is of the class o cases remitted to the judicial discretion of the Land Office and Secretary of the Interior, we do not think that it is one proper for the issue of the writ of mandamus; and we are of opinion that the court below rightly so decided.

The order appealed from will be affirmed, with costs. And it is so ordered.

TUESDAY, *February 3d, A. D.* 1903.

THE UNITED STATES OF AMERICA on the Relation of the Riverside Oil Company, a Corporation, Appellant, *vs.* ETHAN A. HITCHCOCK, Secretary of the Interior.	No. 1264, January Term, 1903.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the order of the said supreme court, in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

February 3, 1903.

In the Court of Appeals of the District of Columbia, January Term, 1903.

U. S. *ex Rel.* RIVERSIDE OIL CO., Appellant, *vs.* ETHAN A. HITCHCOCK, Appellee.	No. 1264. No. 10, Special Calendar.

Now at this time comes the plaintiff in error herein and petitions this honorable court to grant to it a writ of error in said cause to remove the same to the Supreme Court of the United States, and for cause shows that the amount involved is over ten thousand dollars and assigns the following errors committed by this honorable court:

First. The court erred in affirming the judgment of the supreme court of the District of Columbia.

Second. The court erred in affirming the judgment of the supreme court of the District of Columbia in dismissing the petition for a mandamus.

Third. The court erred in affirming the judgment of the supreme court of the District of Columbia in rendering judgment in said cause for defendant.

Fourth. The court erred in not reversing the judgment of the supreme court of the District of Columbia and sustaining the petitioner's demurrer to the defendant's answer.

Fifth. The court erred in not reversing the judgment of the supreme court of the District of Columbia and directing the writ of mandamus to issue to the defendant commanding him to pass the selections in question to patent.

Sixth. The court erred in holding that defendant did not act arbitrarily in refusing an order for a patent to plaintiff in error.

Seventh. The court erred in holding that after the selections had been made and the certificates given by the local land office, jurisdiction existed in the Secretary of the Interior to refuse a patent to plaintiff in error on the record in this case.

Eighth. The court erred in deciding that there was any discretion in the Secretary of the Interior on the record in this case to withhold a patent from plaintiff in error.

Ninth. The court erred in not holding that the equitable title to the land in controversy vested in the selector at the time, and as the result, of selection and relinquishment and that thereafter a ministerial duty only rested on the defendant to deliver to plaintiff in error a patent for said lands.

Tenth. The court erred in ignoring the certificates of the register and received and their legal conclusiveness, which certificates are in words and figures, as follows, to wit:

LAND OFFICE AT VISALIA, CALIF., *Dec.* 14, 1899.

I, Geo. W. Stewart register of the land office, do hereby certify that the land above selected, in lieu of land relinquished to the United States, is free from conflict, and that there is no adverse filing entry, or claim thereto.

GEO. W. STEWART, *Register.*

Eleventh. The court erred in not giving effect to the pleadings and in not giving plaintiff in error the benefit of the admissions made therein.

Twelfth. The court erred in withholding from plaintiff the benefit of the records of the land office, the act of March 3, 1883, and the legal effect of the instructions of the Land Department to its officers to furnish information in respect to vacant land, which instruction reads as follows:

"Any proper information regarding vacant public land may be obtained by application at any of the land officers, a list of which will be found on page 270" (Regulations of the Land Department, July 11, 1899).

Thirteenth. The court erred in its construction of the act of June 4, 1897, in not applying to the said statute the doctrines and principles of law which govern exchanges of land as distinguished from the doctrines applicable to the acquisition of the public land under other statutes.

Fourteenth. The court erred in holding that the defendant set up the defense that he had held that the selected land was closed to settlement because of acts of protestants.

Fifteenth. The court erred in holding as a fact in the case that the defendant had held that the selected land was closed to settlement at the time of selection by reason of the alleged acts of the protestants.

Sixteenth. The court erred in considering or giving any legal effect to the *ex parte* papers filed in the case called protests.

Seventeenth. The court erred in holding that there was any evi-

dence that at the time of selection the selected land was not vacant land open to settlement.

Eighteenth. The court erred in holding that the protestants were contestants or parties to any controversy with the selector in the Land Department or in anywise interested in this case or that there was any contest raised by the protestants in the Land Department over the title to the land described in the petition.

Nineteenth. The court erred in holding that the protestant had lawfully located or in anywise applied to enter the land in controversy or had any right thereto or made any claim thereto of which the Land Department could take cognizance prior to the selection thereof by the selector Clarke.

Twentieth. The court erred in considering or giving any effect to the *ex parte* adverse affidavits filed in the records in this case after the selection had been recorded.

Twenty-first. The court erred in giving effect to supposed local rules and regulations of miners in the absence of any allegation or proof of any such rules and regulations.

Twenty-second. The court erred in giving any effect to the alleged notices of location alleged to have been filed in the office of the county clerk or recorder.

Wherefore, plaintiff prays that its assignment of errors be filed in this court and that a writ of error to remove the cause to the Supreme Court of the United States be granted to the end that the judgment of this court may be reversed and that the writ of mandamus may issue as prayed for in the petition and that the plaintiff in error may have all proper relief.

SHIRLEY C. WARD,
JEFFERSON CHANDLER,
JOHN M. THURSTON,
W. C. PRENTISS,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 1264. U. S. *ex rel.* Riverside Oil Co., appellant, *vs.* Ethan A. Hitchcock, Sec'y &c. Petition for writ of error and assignment of errors. Court of Appeals, District of Columbia. Filed Feb. 12, 1903. Robert Willett, clerk.

TUESDAY, *February 17th, A. D.* 1903.

THE UNITED STATES OF AMERICA on the Relation of the Riverside Oil Company, a Corporation, Appellant,
vs.
ETHAN A. HITCHCOCK, Secretary of the Interior.
} No. 1264.

On motion of Mr. W. C. Prentiss of counsel for the appellant, it is ordered by the court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond is fixed at the sum of three hundred dollars.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The United States of America, on the relation of the Riverside Oil Company, a corporation, appellant and Ethan A. Hitchcock, Secretary of the Interior, appellee, a manifest error hath happened, to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of February, in the year of our Lord one thousand nine hundred and three.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, Riverside Oil Company, a corporation, as principal, and Citizens' Trust and Guaranty Company of West Virginia, as surety, are held and firmly bound unto Ethan A. Hitchcock in the full and just sum of three hundred dollars to be paid to the said Ethan A. Hitchcock, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of March, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court, between The United States upon the relation of said Riverside Oil Company, as appellants, and the said Ethan A. Hitchcock, as appellee, a judgment was rendered against the said The United States and the said relator *and the said relator*, in the name of the United States having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed

to the said Ethan A. Hitchcock, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Riverside Oil Company, in the name of the United States or otherwise shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of Riverside Oil Co.]

RIVERSIDE OIL CO.,
By J. R. JOHNSTON, *Pres't.*
CITIZENS' TRUST & GUARANTY CO. OF W. VA.,
By WILLOUGHBY S. CHESLEY,
Attorney-in-fact.

[Seal of Citizens' Trust & Guaranty Co. of West Virginia.]

Sealed and delivered in the presence of—
WILLIAM C. PRENTISS.

O K.
BEACH, *D. A.*

Approved by—
R. H. ALVEY,
Chief Justice, Court of Appeals of the District of Columbia.

[Endorsed:] No. 1264. The U. S. of A. on the relation of the Riverside Oil Company, a corporation, appellant, *vs.* Ethan A. Hitchcock, Secretary of the Interior. Bond on writ of error to Supreme Court of the U. S. Court of Appeals, District of Columbia. Filed March 10, 1903. Robert Willett, clerk.

UNITED STATES OF AMERICA, *ss:*

To Ethan A. Hitchcock, Secretary of the Interior, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The United States of America, on the relation of The Riverside Oil Company, a corporation is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of

Appeals of the District of Columbia, this 10th day of March, in the year of our Lord one thousand nine hundred and three.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted, March 10, 1903.

MORGAN H. BEACH,
U. S. Dist. Att'y, D. C.

[Endorsed:] Court of Appeals, District of Columbia. Filed Mar. 10, 1903. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 155 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The United States of America, on the relation of the Riverside Oil Company, a corporation, appellant *vs.* Ethan A. Hitchcock, Secretary of the Interior, No. 1264, January term, 1903, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 11th day of March A. D. 1903.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,860. District of Columbia Court of Appeals. Term No. 632. The United States of America on the relation of The Riverside Oil Company, plaintiff in error, *vs.* Ethan A. Hitchcock, Secretary of the Interior. Filed March 11th, 1903.